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Die Güteraufteilung nach Billigkeit aus Anlaß der Ehescheidung

Anwendung des New Yorker statutes' in der richterlichen Praxis

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1. Die vermögensrechtlichen Ansprüche verheirateter Personen waren im Common law durch den Grundsatz der Gütertrennung gekennzeichnet. Im wesentlichen wurde dieses Prinzip im Laufe der 2. Hälfte des 19. Jahrhunderts gesetzlich verankert, und zwar in den „Married Women's Property Acts". Dem Ehegatten, der Eigentümer der Güter war, wurden sie bei Scheidung zugewiesen. In der Praxis bewirkte diese strenge Aufteilung eine außerordentliche Härte für den haushaltsführenden Ehegatten, dessen Partner durch die auswärtige Arbeit während der Ehe Vermögen im eigenen Namen ansammeln konnte.

2. Infolgedessen sind die meisten amerikanischen Common law-Staaten vom System der (strengen) Gütertrennung abgegangen. Aus Gründen der Billigkeit (equity and fairness) führten diese Staaten sodann eine auf dem Uniform Marriage and Divorce Act 1974 (idF: „Act") beruhende Richtlinie ein.

Der Act enthält zwei Aufteilungsgrundsätze, die sich nur mit Bezug auf die Festlegung, welche Güter bei Scheidung der Ehe aufzuteilen sind, unterscheiden. Die erste Alternative ordnet die Aufteilung sämtlicher Güter an, unabhängig davon, wie und wann sie erworben worden waren; die zweite Alternative differenziert zwischen ehelichem Vermögen (marital property), das zwischen den Ehegatten aufzuteilen ist, und Sondervermögen (separate property), das den Eigentumsregeln unterliegt.

In beiden Fällen wird das der Aufteilung unterliegende Vermögen auf dieselbe Art und Weise aufgeteilt, und zwar nach dem Grundsatz der Billigkeit (equitable distribution). Danach kann der Richter das Vermögen nach billigem Ermessen aufteilen.

3. Die Mehrzahl der amerikanischen Common law-Staaten führte den Grundsatz der „equitable distribution" mit Gesetz (statute) ein, einige wenige Staaten sind diesem Beispiel im Wege der Rechtsprechung gefolgt. Zwei Kategorien von statutes regeln diesen Aufteilungsmodus: die eine zählt in einem eigenen Katalog die verschiedenen Kriterien auf, die der Richter bei seiner Ermessensentscheidung berücksichtigen muß, die andere sieht davon ab und räumt dem Richter global die Befugnis ein, das eheliche Vermögen nach Billigkeit aufzuteilen.

Die Beurteilungskriterien können fünf Gruppen zugeordnet werden. Die erste Gruppe umfaßt Maßstäbe, die den finanziellen Bedarf (financial need) betreffen; die zweite regelt Beiträge wirtschaftlicher und nicht-wirtschaftlicher Natur, die die Ehegatten zum ehelichen Vermögen sowie zur Ehe selbst erbracht haben. Die dritte Gruppe nimmt auf die praktischen Folgen der Entscheidung Bezug. In der vierten Gruppe wird den Auswirkungen ehewidriger Verhaltensweisen Rechnung getragen. Meistens sind dabei ehewidrige Beziehungen, wie Ehebruch, bei der Beurteilung nicht zu berücksichtigen, hingegen ist sonstiges vorwerfbares Verhalten auf wirtschaftlicher Ebene, wie etwa Vermögensverschleuderung, durchaus entscheidungsrelevant. Manche Staaten sehen schließlich in einer fünften Gruppe noch einen Auffangtatbestand (catch-all factor) vor.

4. Vorliegender Aufsatz behandelt das „Equitable Distribution Law" von New York aus dem Jahre 1980. In diesem Gesetz sind die auf dem Uniform Marriage and Divorce Act 1974 (idF UMDA 1974) basierenden Aufteilungsgrundsätze der zweiten Alternative verankert. Nur jenes eheliche Vermögen ist Gegenstand der Aufteilung, das von der „deferred community property" erfaßt ist. Die Aufteilung erfolgt nach Billigkeit (equitable distribution). Bis zur Reform 1986 waren hiefür zehn, seither sind dreizehn Kriterien im Gesetz vorgesehen.

Gegner der Aufteilung nach Billigkeit geben zu bedenken, daß dem Richter ein zu weites Ermessen eingeräumt würde und damit das Ergebnis unvorhersehbar sei. Gerade das New Yorker statute soll nach Meinung seiner Befürworter dieser Kritik den Wind aus den Segeln nehmen, indem der Richter bei seiner Entscheidung nach Billigkeit dreizehn Kriterien berücksichtigen, diese der Entscheidung (nachweislich) zugrundelegen und das Ergebnis schließlich begründen muß. Im Gegensatz zu manchen Staaten, die die richterliche Ermessensfreiheit durch eine Vermutung der Aufteilung nach gleichen Teilen einschränken, ordnet dies das New Yorker Recht absichtlich nicht an. Der Gesetzgeber von New York hat bewußt einer größeren Flexibilität den Vorzug gegeben und damit über den Daumen gepeilte Entscheidungen vermeiden wollen.

5. Wir haben die Handhabung der Entscheidungskriterien anhand des Fallrechtes von 1981 bis 1987 untersucht. Zu diesem Zweck wurden die fünf obengenannten Gruppen herangezogen.

6. Zusammenfassend ist festzuhalten, daß das Entscheidungsergebnis in New York mit Bezug auf die Vermögensaufteilung bei Scheidung nicht prognostiziert werden kann. New York hat mit dem Gesetz zur „equitable distribution" (Equitable Distribution Law) offensichtlich eine zu große Flexibilität in Sinne eines Ermessensspielraums eingeführt. Die für eine ausgewogene Anwendung des Gesetzes aufgestellten Kautelen haben sich als unzulänglich erwiesen und zeigen die Notwendigkeit größerer Rechtssicherheit deutlich auf. Das Gleichgewicht zwischen Flexibilität einerseits und Rechtssicherheit andererseits ist in New York somit sichtlich nicht verwirklicht; dazu bedürfte es einer deutlicheren Betonung dieses Aspektes.

Die Akzentuierung der Billigkeit nach dem New Yorker Recht, das heißt die Berücksichtigung verschiedener Umstände, die die Aufteilung des Vermögens zu beeinflussen vermögen, soll dabei nicht beseitigt werden. Eine solche Ermessensfreiheit ist durchaus zu begrüßen. Vielmehr wäre ein vertieft ausgearbeitetes System der Aufteilungskriterien vonnöten, das den Ermessensspielraum sachgerecht eingrenzt und zugleich dem Richter wertvolle Entscheidungshilfe ist.

(Übers. der Redaktion)

Judicial application (1981–1987) of statutory factors for an equitable distribution of marital property upon dissolution of the marriage on divorce in New York. An illustration.

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1. Equitable Distribution: the concept

1. In the traditional common law, notions of family property, marital property or community property are unknown[1]). The Married Women's Property Acts of the second half of the nineteenth century replaced the total incapacity of a woman to hold property at common law by a rigid doctrine of separate property[2]). Thus upon divorce each spouse leaves the marital boat with his or her own separate property. The title principle is dispositive in determining

[1]) P.M. BROMLEY & N.V. LOWE, BROMLEY'S FAMILY LAW 502 (1987).
[2]) *Id.*

what is whose property[3]): the party holding title to property is awarded an interest equal to the share that she or he held under the title principles.

This title concept worked a great hardship upon a spouse-homemaker (this is the housewife or the housman), whose partner accumulated property during the marriage and held title solely in his (or her) name[4]). Though thanks to the Married Women's Property Acts married women could own property, the problem was to obtain property[5]). In the classic family the wife was bearing and rearing the children and had no time nor opportunity to acquire property[6]). The husband was the only wage earner[7]) and almost all of the family assets were obtained with his earnings[8]). This meant he had the ownership title of all that property. It was thus all his separate property and would all be awarded to him upon divorce. The common law property division occurs as if no marriage has taken place[9]). The partner of a couple who made considerable efforts in amassing assets, placed in the husband's name, did not have a single right to this wealth upon divorce and was entirely dependent on alimony[10]).

2. In the United States, these inequities led in most of the common law states to a general consensus regarding the necessity of reform[11]). The revisions would emphasize the equality of interests in the marriage, being an economic and social partnership and would introduce the concept of marital property in the common law states[12]). Most of the common law states in the United States thus abandoned the title principle for the sake of 'equity and fairness'. This incorporation of sharing principles is a recent phenomenon that has been introduced by the Uniform Marriage and Divorce Act (UMDA)[13]).

However the need for reform was already recognized much earlier than in 1974, even prior to the turn of the century[14]). Although at least eleven uniform acts were proposed, there was never a majority willing to accept a particular draft[15]). Nevertheless two states did not wait for a uniform act and enacted legislation that considered marriage as a partnership and joint

3) Dileo and Model, *A survey of the law of property disposition upon divorce in the tristate area,* 56 ST. JOHN'S L. REV. 219, at 220 note (2) (1982); Diamond and Prinsell, *New York's Equitable Distribution Law: A sweeping reform,* 47 BROOKLYN L. REV. 67, at 70 (1980).

4) 9B West Mc Kinney's Forms, MFL, Par. 17.01, 303; Brynteson, *Equitable distribution in New York,* 45 ALB. L. REV., 483, at 487 (1981).

5) Note, *The development of sharing principles in common law marital property states,* 28 U.C.L.A. L. REV. 1269, at 1276, note 26 (1981) (hereinafter: *Sharing principles*).

6) W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 8 (1971).

7) *Sharing principles, supra* note 5, at 1276, note (38).

8) *Sharing principles, supra* note 5, at 1276.

9) *Id.*

10) The concept of alimony often served as a means of lifetime support and dependence of one spouse upon the other long after the marriage was over *(Id.);* This is what Younger calls the difference between community property and common law. In both systems, he says, the legal content of the marriage bargain is basically an exchange of the wife's domestic services for the husband's financial support. The difference in community property jurisdictions is that upon divorce, in additon to support (alimony), the wife is entitled to compensation in the form of an interest in community assets (Younger, *Community property, women and the Law School curriculum,* 48 N.Y.U.L. REV. 211, at 230).

11) Dileo and Model, *supra* note 3; J. MC CAHEY (ed.), VALUATION AND DISTRIBUTION OF MARITAL PROPERTY Chapter 3, p. 5 (1987); *Sharing Principles, supra* note 5, at 1280, with references in note (63) to the statutory provisions of all the states.

12) Brynteson, *supra* note 4, at 487–488.

13) *Sharing principles, supra* note 5, at 1284–85: The American Bar Association endorsed the UMDA in 1974.

14) *Id.,* at 1284, note (88).

15) *Id.,* at 1285.

enterprise. In 1889 Kansas amended its alimony statute to provide for the "just and reasonable" division of "property acquired by the parties jointly during their marriage, whether the title thereto be in either or both of said parties"[16]). In 1893 Oklahoma adopted a statute modeled after the Kansas statute[17]).

3. In the United States the reform movement, however, disagreed as to the method to achieve the shared ideals. There was no consensus on the level of definition of the mass that could be distributed. Therefore, the Act which was finally accepted offers two alternatives concerning the property that can be divided. The UMDA, Alternative A allows distribution of all property, "however and whenever acquired"[18]). UMDA, Alternative B defines what property may be divided (marital property) and what property is not subject to distribution (separate property). For this separate property normally the title principles govern. This is a system of 'deferred community property'. It uses the definitions of community property but only applies them at the time of the dissolution of the marriage and not while the marriage is still existing.

4. Also the question of the distributive method was not agreed on immediately. The most important issue was the choice of the principle: equitable or equal distribution? In New York for instance one faction preferred the approach of equitable distribution. In this view the courts divide marital property, based upon stated criteria. The other thesis favored the adoption of the community property, with its presumption of equal division of all property acquired during the marriage[19]). Particularly among women's groups there was concern that the equitable distribution vested too much discretion in the courts and a firmer standard was needed. This standard was supposed to be found in an "equal distribution" law, with a fifty-fifty division of marital property. This proposal was voted down[20]) and in 1980 New York enacted the first approach into law[21]).

5. The Uniform Marriage and Divorce Act clearly chose the equitable distribution. For this matter there is no difference between the two Alternatives. Equitable distribution means that the judge can divide property as he thinks is just and fair, regardless of title. The doctrine of equitable distribution permits a spouse who can point to an accepted reason – such as contribution toward the acquisition of property or need[22]) – to claim an equitable interest in property which may be titled in the other spouse[23]). This formula thus works for all property without a distinction between marital and separate property in UMDA, A and only for the category of marital property in UMDA, B[24]).

16) GEN. STAT. KAN. 4756 (1889).

17) OKLA. STAT. ANN. Tit. 12-1278 (West 1976).

18) *Sharing principles, supra* note 5, at 1286–1287: This provision was recommended by the ABA.

19) Brynteson, *supra* note 4, at 488–489.

20) Foster, *Commentary on equitable distribution,* 26 N.Y.L. SCH. REV. 6, at 31 (1981): "The California experience has shown that equal distribution frequently is inequitable".

21) 1980 N.Y. Laws, ch. 281, par. 9 (amending N.Y. DOM. REL. LAW par. 236 (1977), Cf. *infra* 3.1.

22) Cf. *infra.*

23) Freed & Walker, *Family Law in the 50 states: An overview,* 18 FAM. L.Q. 369, at 392 (1985).

24) Note that UMDA, B does not adopt the equal distribution principle of the community property but divides the property equitably (in just proportions after considering all relevant factors). Thus the difference between these equitable distribution states that use a deferred community property system and the real equitable distribution states of UMDA, A is located in this issue concerning the definition of the divisible mass. The deferred community property system of the UMDA, B thus differs from the traditional community property system with an equal distribution standard, not only in that the principles do not apply during the marriage but also in that the distribution method is an equitable one.

Most of the American common law states adopted one or another Alternative of the UMDA and thus chose for an equitable distribution standard which vests the property settlement in the discretion of the judiciary[25]). Nevertheless there are quite some equitable distribution states where the judiciary uses the equal division as the starting point[26]). Note that the new Uniform Marital Property Act, enacted in Wisconsin with the law of April 4 1984[27]), under which each spouse has a one half, undivided ownership of the marital property during the marriage, does not concern property distribution, but the application of community property definitions *during the marriage,* as opposed to deferred community property systems[28]).

2. Equitable Distribution: the working out

6. The choice of the vast majority of Amercian common law states of the concept of equitable distribution of marital property, does not imply that the conrete working out of this principle should be uniform.

2.1. Statute

7. Most of the states have adopted the system of equitable distribution by enacting a statute[29]). We distinguish between two kinds of statutes. First there are the states with statutes

25) Hauserman, *Homemakers and divorce: problems of the invisible operation,* 46 FAM.L.Q. 41, at 48 (1983).

26) The ARIZ.REV.STAT. 25–318 calls for equitable distribution. The case law however has construed this to mean 'substantially equal' in absence of sound reasons justifying a contrary result (Tester v. Tester, 597P.2d 194 [Ariz.App. 1979]). However, according to some authors the Arizona case law calls for an 'equal' division as starting principle (MC CAHEY, *supra* note 11, Ch. 20, p. 96; Foster & Freed, *Family Law in the 50 states: An overview,* 17 FAM.L.Q. 365, at 380, note 1 [1984]). The difference between 'equal' and 'substantially equal' is that the former is very strict (50/50) while the latter would allow a division of for instance 55/45. The difference between 'substantially equal' and 'equitable' is that under the first rule the departure from the 50/50 division is limited by the condition that the division must remain substantially equal, i.e. remain in the neighbourhood of 50/50. Under equitable distribution a 100/0 division is justifiable; In Arkansas and North Carolina the courts must divide marital property equally unless they find such a division inequitable (11 FLR 3022 and 3024); The Supreme Court of Ohio ruled in Cherry v. Cherry (421 N.E.2d 293 [1981]) that, though the eleven factors set out in the alimony statute should be considered in arriving at an equitable distribution, equal division should be the starting point; In Oregon there is, as in the community property states, a rebuttable presumption that both spouses have contributed equally to the acquisition of property during the marriage, irrespective of the fact that such property ist jointly or separately held (11 FLR 3024); Though in New York the proposal for an equal distribution statute was voted down and the Equitable Distribution Law of 1980 was enacted, it was said that from the viewpoint of the equitable distribution "the contributions of each partner to the marriage should ordinarily be regarded as equal and there should be an equal division of family assets, unless this would be inequitable under the circumstances of the particular case" (14 McKinney's consolidated laws of New York annotated DOMESTIC RELATIONS LAW par. 236 (hereinafter: DRL), at 273, quoting the Assembly Memorandum in support of the Equitable Distribution Law). For further comments on the New York debate between equal and equitable distribution, cf. *infra* 3.1; In West Virginia the statute prescribes the court to "presume that all marital property is to be divided equally between the parties, but (it) may alter this distribution ... after considering several factors ... enumerated in the same statute" (11 FLR 3025).

27) UNIFORM MARITAL PROPERTY ACT (UMPA), see FLR RF 201:0093.

28) See 12 FLR 3001, 13 FLR 3015, 15 FLR 1043. Marital property is nearly all property acquired during the marriage, including all forms of income (11 FLR 3025). Individual property are gifts or inheritances to one spouse alone, property brought into the marriage by one spouse, and most appreciation on individual property (11 FLR 3825).

29) Only South Carolina and Florida became an equitable distribution jurisdiction by court decision; Cf. *infra.*

enumerating the specific factors that must be used in the decision-making process. On the other hand there are also states where the legislature only gives the judge a mandate to distribute equitably the marital assets and does not list any factors at all.

2.1.a. Specific factors enumerated

8. Most states provide for guidelines[30]) in the statute in order to guide the court[31]). Hauserman calls this the 'quantification' or the measurement of each party's contributions to the estate[32]). This statement is too narrow since the factors set forth by the statute are concern more than contributions.

Indeed the guidelines may be divided into five categories[33]). First one can discern the factors geared to financial need[34]). Secondly there are factors related to economic and non-economic contributions made by the parties to the accumulation of marital assets as well as to the marriage itself[35]). Non-economic or nonmonetary contributions are contributions of a spouse as homemaker, parent and contributor to the well-being of the family[36]). Almost all the states now consider this as a recognizable contribution[37]). A problem coming up with this acceptance is to find an accurate method to value economically these services of those who do not earn monetary income for their in-home production[38]). Commonly used methods include replacement cost and opportunity cost[39]).

9. A third category deals with the practical consequences of a decision. Examples of this kind are factors seven (liquid or non-liquid character of all marital property), nine (impossibility or difficulty of evaluating a component asset or interest in a business) and ten (tax consequences) of the Equitable Distribution Law of New York[40]).

30) The court however retains a wide latitude in arriving at a result which is just, equitable or right (MC CAHEY, *supra* note 11, Ch. 20, p. 95, note (16); Younger, *supra* note 10, at 242).

31) For a list of the common law states with the respective codes, see MC CAHEY, *supra* note 11, Ch. 19, p. 18, note (1).

32) Hauseman, *supra* note 25, at 48-9.

33) For a laundry list of factors, in order of frequency of their use, see MC CAHEY, *supra* note 11, Ch. 19, p. 19–21; For indication of the number of states that use each particular factor: see Note, *Property division and alimony awards: A survey of statutory limitations on judicial discretion,* 50 FORDHAM L.REV. 415, at 439–440 (1981) (hereinafter *Property division*).

34) Such as the parties' financial ability *(Property division, supra* note 33) and earning capacity (MC CAHEY, *supra* note 11; Younger, *supra* note 10), the age and health, education and time needed for retraining, employment history (Younger, *id.*), child custody; An author argues that these factors are more appropriate to an alimony determination because of their relation to the financial needs of the parties *(Property division, supra* note 33, at 440).

35) If the purpose of property division is to "distribute the marital assets equitably between the parties", then all the factors considered should be addressed to an evaluation of such assets (MC CAHEY, *supra* note 11, Ch. 19, p. 18; *Property division, supra* note 33, at 439–440). Twenty-six factors doing this are enumerated in note (172) of *Property division, id.* They include the contribution of each partner to the acquisition of the marital property, the opportunity for each for future acquisition of capital assets and income, the value of the separate property of each, and the contribution of each spouse in the acquisition, preservation or appreciation in value of the respective estates.

36) Freed & Walker, *supra* note 23, at 393.

37) For a survey of these states, see Freed & Walker, *id.,* at 394–395.

38) Hauserman, *supra* note 25, at 49.

39) The replacement cost refers to the cost to replace the housewife by a third person who performs the home services. The opportunity cost refers to the chances foregone by the housewife by choosing the household instead of a career. See Hauserman, *supra* note 25, at 50–53 for an explanation of these methods and a discussion of the valuation issue.

40) See point three.

The fourth group focuses on the behaviour of the parties. In recent years the factor of 'economic fault'[41]) has gained importance[42]) whereas the classical fault factor or marital misconduct has lost importance. Some states expressly preclude the court from considering a party's misconduct, some statutes are silent on the issue[43]) and still other states regard marital fault as a discretionary factor that may be considered[44]).

10. Finally there might be a catch-all factor. Although only some states expressly list a 'catch-all' factor[45]), several other states achieve the same result by urging their judges to consider all relevant factors and not only those enumerated in the statutes[46]).

2.1.b. No factors listed

11. There are also some states with statutes calling for equitable distribution of the marital assets upon dissolution of the marriage by divorce without listing the specific factors a court must consider to make a property award[47]). The factors and circumstances that are considered in these states have been developed by judicial decisions.

2.2. No statute

12. Finally there are the jurisdictions where the formula to distribute the family assets equitably has been introduced by the judiciary. A borderline case is South Carolina where the statute gives the court the power to settle "all legal and equitable rights of the parties ... to the real and personal property of the marriage ... if requested by either party"[48]). This provision has been interpreted by the courts to enable them to distribute property upon divorce along equitable lines[49]).

The courts of Florida, Georgia and Ohio – having no specific statute governing property division upon divorce on which to rely – reached an equitable distribution of property through an expansive interpretation[50]) of the state's alimony statute[51]).

41) E.g. wasteful dissipation of assets: see the New York case Blickstein v. Blickstein, *infra* 3.2, factor 13, which distinguishes economic fault from marital fault: the former is a factor to be considered while the latter is in principle not to be taken into account, unless this misconduct is so egregious and uncivilized as to shock the conscience of the court. See also O'Brien v. O'Brien (C.A.), which affirms the Blickstein rule.

42) For a survey of states considering economic misconduct, see Freed & Walker, *supra* note 23.

43) For a list of states excluding fault and states silent in their statutes on the fault issue, see Freed & Walker, *id.; Property division, supra* note 33, at 438, note (64).

44) Freed & Walker, *id.*

45) E.g. "other just and equitable considerations"; See IOWA CODE ANN. Par. 598.21 (1) (m); N.Y. DOM. REL. LAW Par. 236, Pt. B (5) (d) (13); WIS. STAT. ANN. Par. 767.255 (12).

46) E.g. COL. REV. STAT. Par. 14-10-113; DEL. CODE. ANN. Tit. 13, Par. 1513(a); *Property division, supra* note 33, at 441.

47) Alabama, Michigan, New Hampshire, New Jersey, North Dakota, Oklahoma and Utah: see MC CAHEY, *supra* note 11, Ch. 19, note (3) for the references to the relevant statutes of these states.

48) 11 FLR 3025.

49) *Id.*

50) *Id.*

51) Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. Sup. Ct. 1980); Cherry v. Cherry, *id.;* Stokes v. Stokes, 246 Ga 765 (1981); See *Sharing principles, supra* note 5, at 1304–1305 for a good discussion about this issue in Ohio.

3. The Equitable Distribution Law of New York

3.1. The statute

13. After a long period of discussion, the state of New York enacted in 1980 the Equitable Distribution Law (1980 N.Y. Laws, ch. 281, par. 9, amending the New York Domestic Relations Law, Par. 236, Part B [1977]). The legislature chose a system modelled after the UMDA, B. The statute thus defines marital property and separate property according to the definitions of the deferred community property systems[52]).

Concerning the formula to divide the mass of marital property, New York preferred the system of equitable distribution. The legislators in New York provide the judiciary with a list of criteria on which to base their determinations. These criteria are laid down in Domestic Relations Law, Par. 236, Part B, (5) (d). In 1980 the statute listed only ten factors. In 1986, however, section (5) (d) was amended by 1986 N.Y. Laws, Ch. 884, par. 3. Subparagraphs ten to twelve were added to section (5) (d) and the former factor ten was redesignated as subparagraph thirteen. The following thirteen factors are enumerated in section (5) (d): "(1) the income and property of each party at the time of the marriage and at the time of the commencement of the action, (2) the duration of the marriage and the age and health of both parties, (3) the need of the custodial parent to occupy or use the marital residence and to use or own its household effects, (4) the loss of inheritance and pension rights upon dissolution of the marriage as of the date of the dissolution, (5) any award of maintenance under subdivision six of this part, (6) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career and career potential of the other party, (7) the liquid or non-liquid character of all marital property, (8) the probable future financial circumstances of the parties, (9) the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest intact and free from any claim or interference by the other party, (10) the tax consequences to each party, (11) the wasteful dissipation of assets by either spouse, (12) any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration, (13) any other factor which the court shall expressly find to be just and proper".

The law of 1980 is termed an "equitable distribution" statute because the judge is permitted to consider anything which the court finds to be just and proper. This is expressly stated in the thirteenth factor[53]) but it is clear that all factors, being no more than guidelines, give the

52) In par. 236, pt. B (1) (c) the law defines marital property as follows: "All property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held, except as otherwise provided in agreement pursuant to subdivision three of this part. Marital property shall not include separate property as hereinafter defined". This definition, given in pt. B (1) (d), says: "The term separate property shall mean:

(1) property acquired before marriage or property acquired by bequest, devise or descent, or gift from a party other than the spouse;

(2) compensation for personal injuries;

(3) property acquired in exchange for or the inrease in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse;

(4) property described as separate property by written agreement of the parties pursuant to subdivision three of this part".

53) N.Y. DOM. REL. LAW par. 236, Pt. B (5) (d) (13).

judge a degree of flexibility which permits him to decide what is just and proper in the particular case[54]).

14. Opponents of this equitable distribution felt too big a latitude which would perpetuate inequities[55]). However this criticism is said to be met by the enumeration of the thirteen factors of Pt. B (5) (d). Moreover the requirement in (5) (g) to set forth in its opinion "the factors it considered and the reasons for its decision", is said to provide a check on the court's discretion[56]). A danger of mandating a presumption in favour of equal distribution, Foster argues, is that there would be a "cop out" and some judges might use it in order to avoid the difficult weighing and balancing process the case may deserve[57]). Thus the policy decision by the legislature was that flexibility is most desirable and that "rules of thumb" should be avoided[58]). The court must do justice to the parties, with fairness and due regard to the facts and circumstances of each individual case[59]). Since each case is unique, the legislature cannot predict all possible situations and the factors enacted in the statute can only be guidelines for the judge in his difficult search for a just and fair solution to the particular problems at issue.

Though the opposition against the equitable distribution standard, because of its danger of vesting too much discretion in the judiciary and the corresponding plea for a firmer standard such as equal distribution, was rejected and their proposal was voted down[60]), the Assembly Memorandum nevertheless states that from the viewpoint of equitable distribution "the contributions of each partner to the marriage should ordinarily be regarded as equal, and there should be an equal division of family assets, unless this would be inequitable under the circumstances of the particular case"[61]). However a legislative preference for equal distribution is not expressed in the statute[62]). In fact this favor is at least partially contradicted by the requirement that the court consider twelve specific factors and balance the weight of each factor to arrive at a just distribution of the marital property[63]). Accordingly the courts, including the Court of Appeals, repeatedly have stressed that equitable distribution does not necessarily mean equal distribution[64]). Nonetheless, the courts recognize that in the context of a long-term mar-

54) N.Y. DOM. REL. LAW par. 236, Pt. B (5) (d) (1)–(12).
55) Brynteson, *supra* note 4, at 504.
56) *Id.*, at 505–506.
57) Foster, *supra* note 20, at 32.
58) *Id.*, at 31–32.
59) N.Y.DOM. REL. LAW par. 236, Pt. B (5) (c).
60) Foster, *supra* note 20, at 31.
61) DRL, *supra* note 26, at 273, quoting the Assembly Memorandum in support of the Equitable Distribution Law; Foster describes the furor over equal as distinguished from equitable distribution as a tempest in a teapot because an equitable distribution will call in many cases for an equal distribution (Foster, *supra* note 20, at 32). I cannot agree with this statement. It seems to me that it is not so important nor relevant to look, like Foster does, to the quantity of cases in an equitable distribution system, where equal distribution was found to be appropriate. Far more decisive in making a choice between the two methods is to examine how big the injustice and unfairness is, if the marital property, in cases with special circumstances, is automatically subject to an equal distribution.
62) It does not appear in Pt. B (5) (c) nor in (5) (d).
63) DRL, *supra* note 26, at 273.
64) The highest court of the state of New York is called the Court of Appeals. The Supreme Court is the common court on the first level. One can appeal the decision of the Supreme Court in the Appellate Division, which is divided in four Departments (See R. DAVID, LES GRANDS SYSTEMES DE DROIT CONTEMPORAINS 435 (1982); Ackley v. Ackley, 100 A.D.2d 153, 472 N.Y.S.2d 804 (4th Dep't 1984); Arvantides v. Arvantides, 106 A.D.2d 853, 483 N.Y.S.2d 550 (4th Dep't 1984), 64 N.Y.2d 1033, 489 N.Y.S.2d 59, 478 N.E.2d 199 (Ct. App. 1985); Cappiello v. Cappiello, 110 A.D.2d 608, 488 N.Y.S.2d 399 (1st Dep't 1985), affirmed 66 N.Y.2d 107, 495 N.Y.S.2d 318, 485 N.E.2d 983 (1985), rearg. denied 67 N.Y.2d 647, 490 N.E.2d 558 (1986); Kobylack v. Kobylack, 96 A.D.2d 831, 465 N.Y.S.2d 581 (2d Dep't 1983); 62 N.Y.2d 399, 477 N.Y.S.2d 109, 465 N.E.2d 829 (Ct. App. 1984), rev. and rem. 111 A.D.2d 221, 489 N.Y.S.2d 257 (2d Dep't 1985); Pacifico v. Pacifico, 101 A.D.2d 709, 475 N.Y.S.2d 952 (4th Dep't 1984); Rodgers v. Rodgers, 98 A.D.2d 386, 470 N.Y.S.2d 401 (2d Dep't 1983); Ward v. Ward, 94 A.D.2d 908, 463 N.Y.S.2d 634 (3d Dep't 1983); Nehorayoff v. Nehorayoff, 108 Misc. 2d 311, 437 N.Y.S.2d 584 (Sup. Ct. Nassau Cty, 1981), (however pointing out that the normal rule is the equal division, at 592: "while attentive to her own needs and aspirations, she has not so neglected her responsibilities as to justify anything but an equal division of such conventional marital property as . . .", cf. *infra* 3.2, factor six).
65) Angelo v. Angelo, 74 A.D.2d 327, 428 N.Y.S.2d 14 (2d Dep't 1980); Bisca v. Bisca, 108 A.D.2d 773, 485 N.Y.S.2d 302 (2d Dep't 1985), app. dism. 66 N.Y.2d 741, 497 N.Y.S.2d 365, 488 N.E.2d 111 (1985); Perri v. Perri, 97 A.D.2d 399, 467 N.Y.S.2d 226 (2d Dep't 1983), app. dism. 61 N.Y.2d 603, 472 N.Y.S.2d 1026, 460 N.E.2d 1360 (1984); Roth v. Roth, 97 A.D.2d 967, 468 N.Y.S.2d 764 (4th Dep't 1983); Rywak v. Rywak, 100 A.D.2d 542, 473 N.Y.S.2d 239 (2d Dep't 1984); Jolis v. Jolis, 111 Misc. 2d 965, 446 N.Y.S.2d 138 (Sup. Ct. New York Cty 1981), affirmed 98 A.D.2d 692, 470 N.Y.S.2d 584 (1st Dep't 1983); Nehorayoff v. Nehorayoff, 437 N.Y.S.2d 584.
66) Foster, *supra* note 20, at 37.
67) DRL, *supra* note 26, at 274, quoting the Assembly Memorandum in support of the Equitable Distribution Law.
68) Foster, *supra* note 66; The word 'former' refers to the text of the DRL before the reform of 1980, see *supra* note 21.
69) DRL, *supra* note 26, at 274.

riage (if no other factors seem to require special consideration and reflection in the distribution), the equitable distribution of the marital property should be equal or as close to equal as possible[65]).

3.2. A case law (1981–1987) analysis of the factors listed in the Equitable Distribution Law of New York

15. The thirteen factors to be considered in making an equitable distribution of marital property in New York will now be commented on in sequence through a case law analysis. While reading the analysis, it should be kept in mind that a specific factor may have an enhanced or diminished significance depending upon the facts of the particular case[66]). Indeed, it is apparent from the use of the word "shall" in Pt. B (5) (d) that the legislature intended the courts to consider all the factors but left the weight of each factor in a particular case to the discretion of the court. The factors are guidelines: "it was impossible to specify determinations because of the diversity of facts which may be involved"[67]) and Pt. B (5) (c) explicitly states that the equitable distribution shall take place "considering the circumstances of the case and of the respective parties". This last phrase is adopted from the language of former Domestic Relations Law par. 236, and serves as a general standard[68]).

3.2.1. Factors concerning financial need

3.2.1.a. Factor 1

"the income and property of each party at the time of the marriage and at the time of the commencement of the action"

16. This implies that a spouse with lesser earning power and less property may be deserving of a greater share of the marital property[69]).

The statute refers to "property of each party". As there is no mention of "separate" or "marital" property, it is clear that, even though separate property is excluded from equitable distribution, it remains a factor to be considered in making up a fair division of marital property. In *Brennan v. Brennan* the Appellate Division (1984) held that the allocation formula awarding the wife forty percent of the value of the marital property was proper. One of the two factors justifying the decision was the wife's substantial separate property acquired by inheritance and unmatched by equivalent independent assets of the husband[70]). However, property exempt by operation of law might not be included in the analysis. The United States Supreme Court stated in *Hisquierdo* (1979) and *Mc Carty* (1981) that railroad and military retirement benefits may not be subject to equitable distribution on the ground of federal preemption[71]). While these cases have been reversed by Congress, they still suggest that any property exempt under Federal Law must be excluded from any consideration[72]).

The courts must consider both property owned at the time of the marriage and at the time of commencement of the action. In *Jeruchimowitcz v. Jeruchimowitcz* (Sup. Ct. New York Cty 1985) the court mentions the fact that neither party has appreciable assets at the time of the action or when they entered the marriage[73]). A consideration in *Nehorayoff v. Nehorayoff* (Sup. Ct. Nassau Cty 1981) is that there is little evidence of significant income or property at the time of the marriage seventeen years ago[74]).

In *Sorrentino v. Sorrentino* (Appellate Division 1986) the court considers the fact that a plaintiff-wife, living with her child in the basement of her parents' house, has no property and really needs to obtain adequate accommodations[75]). In two cases the court does not consider the property of one of the parties at time of commencement of the action but the *use* one has of a certain item[76]).

17. Also the income of both parties, at the time of the marriage[77]) and the commencement of the action[78]), must be taken into account. There are several examples of this balancing exercise in the typical situation where the husband is very wealthy, or has at least a sufficient earning capacity, while the wife is not capable of self-support or has a substantially lower income[79]). In some other cases the parties were in relatively the same economic situation and, since no other factor was found to be so strong as to require a solution in favour of one of the spouses, the court decided to distribute the marital assets equally[80]).

In *Michalek v. Michalek* (Appellate Division 1985) the husband earned 2/3 of the combined earnings[81]). An award of 2/3 of the marital property for the husband was found to be proper since the parties pooled their earnings and contributed financially to their living expenses and accretion of property in proportion to their earnings[82]). In *Flanagan v. Flanagan* (Appellate Division 1986) the financial condition of the parties was such that they needed to obtain as quickly as possible their equitable shares of the net proceeds of the sale of the marital residence[83]). However, the need of the third factor outweighed this need[84]) and the custodial parent was awarded exclusive possession of the residence for two years.

Two cases decided in favour of the woman, despite the (compelling?) financial need of the man. The Appellate Division (1986) in *Zuch v. Zuch* reverses the trial court's denial to the wife of an equitable share in the marital residence because of the husband's unemployment at the time of trial, inter alia[85]) on the ground that his unemployment was planned to thwart a large matrimonial award to her[86]). Despite the drastically reduced income of the husband after he left the marital residence, the Appellate Division (1986) in *Erdheim v. Erdheim* awards sixty percent of the marital assets and sole ownership of the marital residence to the wife[87]).

The decision in *Felisa v. Allen* (Fam. Ct. Bronx Cty 1980) suggests that, where each spouse remarried, any support furnished by the third party might, to some degree, be imputed to the spouse[88]).

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70) Brennan v. Brennan, 103 A.D.2d 48, 479 N.Y.S.2d 877, at 881 (3d Dep't 1984): the second considered factor will be discussed *infra* under factor thirteen.

71) Hisquierdo v. Hisquierdo, 99 S.Ct. 802, 439 U.S. 572, 59 L.Ed.2d.1 (1979); Mc Carty v. Mc Carty, 101 S.Ct. 2728, 453 U.S. 210, 69 L.Ed.2d. 589 (1981).

72) DRL, *supra* note 26, at 275.

73) Jeruchimowitcz v. Jeruchimowitcz, 128 Misc. 2d 888, 491 N.Y.S.2d 576, at 580 (Sup. Ct. New York Cty 1985).

74) Nehorayoff v. Nehorayoff, 437 N.Y.S.2d at 591.

75) Sorrentino v. Sorrentino, 116 A.D.2d 564, 497 N.Y.S.2d 420, at 423 (2d Dep't 1986): the court awards a distributive award of fifty percent of the value of the marital premises: cf. factor six.

76) Fagelbaum v. Fagelbaum, 115 A.D.2d 454, 495 N.Y.S.2d 692 (2d Dep't 1985); Matsuo v. Matsuo, 92 A.D.2d 710, 460 N.Y.S.2d 627, at 628 (3d Dep't 1983). In both cases the wife does not get the exclusive possession of a Mercedes because she has *use* of another recent model automobile: cf. factor 13.

77) Arvantides v. Arvantides, 483 N.Y.S.2d at 551: the husband was already practicing dentistry prior to the marriage.

78) Two cases consider generally the "present status and financial circumstances" of the parties to justify that the offset was equitable: Tanner v. Tanner, 107 A.D.2d 980, 484 N.Y.S.2d 700, at 703 (3d Dep't 1985); Ward v. Ward, 463 N.Y.S.2d at 636.

79) Hillmann v Hillmann, 109 A.D.2d 777, 486 N.Y.S.2d 87, at 89 (2d Dep't 1985); Knapp v. Knapp, 105 A.D.2d 1019, 483 N.Y.S.2d 461 (3d Dep't 1984); Lischinsky v. Lischinsky, 120 A.D.2d 824, 501 N.Y.S.2d 938, at 941 (3d Dep't 1986); Van Housen v. Van Housen, 114 A.D.2d 411, 494 N.Y.S.2d 135, at 136 (2d Dep't 1985); Jeruchimowitcz v. Jeruchimowitcz, 491 N.Y.S.2d at 580; Jolis v. Jolis, 446 N.Y.S.2d at 150; Mc Dermott v. Mc Dermott, 123 Misc. 2d 355, 474 N.Y.S.2d 221, at 223 (Sup. Ct. Richmond Cty 1984), rev. in part and affmd. in part as modified: 119 A.D.2d 370, 507 N.Y.S.2d 390 (2d Dep't 1986).

80) Alwell v. Alwell, 98 A.D.2d 549, 471 N.Y.S.2d 899, at 902 (3d Dep't 1984); Cunningham v. Cunningham, 105 A.D.2d 997, 482 N.Y.S.2d 148 (3d Dep't 1984); Both former cases decide not to distribute the pension rights since each party contributed on his own behalf to a pension fund; Perri v. Perri, 467 N.Y.S.2d at 228; Sementilli v. Sementilli, 102 A.D.2d 78, 477 N.Y.S.2d 626, at 634 (1st Dep't 1984); Wilson v. Wilson, 101 A.D.2d 536, 476 N.Y.S.2d 120, at 123 (1st Dep't 1984); Kobylack v. Kobylack, 110 Misc. 2d 402, 442 N.Y.S.2d 392, at 393 (Sup. Ct. Westchester Cty 1981).

81) Michalek v. Michalek, 114 A.D.2d 655, 494 N.Y.S.2d 487, at 488 (3d Dep't 1985).

82) Cf. factor six.

83) Flanagan v. Flanagan, 118 A.D.2d 68, 500 N.Y.S.2d 34, at 34–35 (2d Dep't 1986).

84) Cf. factor three.

85) Cf. factors two, five, six, twelve and thirteen.

86) Zuch v. Zuch, 117 A.D.2d 397, 503 N.Y.S.2d 343, at 347 (1st Dep't 1986); Cf. factor twelve.

87) Erdheim v. Erdheim, 119 A.D.2d 623, 501 N.Y.S.2d 77, at 79 (2d Dep't 1986); Cf. factor eight.

88) Felisa v. Allen, 107 Misc. 2d 217, 433 N.Y.S.2d 715. However, there will normally not be a new spouse in the picture during an equitable distribution proceeding. The facts in the case of Felisa v. Allen were as follows. The husband remarried after his divorce from wife 1 with whom he had child A. He has a young child B from this second marriage. With his present wife 2 he agreed that she would continue her job while he remained at home to look after the household and the child. Wife 1 asks for support of child A. The husband argues that he cannot be expected to leave child B to secure work and support A, because he would not be required to do this if he were a woman. The court agrees quoting the US Supreme Court decision in *Orr v. Orr* (1979): "No longer is the female destinated solely for the home and the rearing of the family and only the male for the market place and world of ideas" (Felisa v. Allen, 433 N.Y.S.2d at 716; Orr v. Orr, 440 U.S. 268, 99 S.Ct. 1102, 59

18. The time periods in this factor are the same as in the definition of marital property[89]). The drawback is that this may encourage a spouse foreseeing a lucrative business prospect in the future to commence a divorce action (of course, assuming there are marital difficulties on the horizon) immediately[90]). On the other hand, the possibility of dilatory tactics and repeated adjournments to delay termination of the marriage makes the "time of commencement" preferable to a later date[91]).

3.2.1.b. Factor 2

"the duration of the marriage and the age and health of both parties".

19. In *Hessen v. Hessen* the Court of Appeals (1974) decided that a stricter degree of proof is required to terminate a marriage on the ground of cruelty where parties were married for a long time[92]). While this factor two is not concerned with the degree of proof required to establish fault grounds, it suggests that greater protection should be given to spouses, particularly the more dependent spouse, in a long-term marriage[93]).

20. The elements of age, health and duration of a marriage form a triad and may be considered together in making an assessment of the weight to be given factor two[94]).

The Appellate Division (1986) in *Zuch v. Zuch* called the trial court's finding that the marriage was of brief duration incredible, since the parties lived three years together and were married after this period for nine years[95]). It is remarkable that the court in this case even takes into account the period of unmarried cohabitation of the parties.

In a marriage of short duration there is less time for a party to become dependent on the other. The economic partnership, if there is one, may be weak. In *Kobylack v. Kobylack* (Sup. Ct. Westchester Cty, 1981) the parties were married for some ten years[96]). However, both spouses proceeded with their careers in exactly the same way they would have done if they had not been married[97]). Therefore, the court apportioned the marital property in accordance with

L.Ed.2d 306 [1979]). The court however finds that the earnings of wife 2 are the property of the marriage: since the husband contributes to the marriage as a homemaker and caretaker of their child B, he is entitled to use the marital property for payment of his legal obligations, such as the support of child A. Though the marriage between the husband and wife 2 is still existing and neither of them seeks distribution, the court decides that marital property exists and that the nontitle-holder can use it to meet his personal obligations. This seems to be in contradiction with the principles of the deferred community property system (cf. *supra* nr. 3).

89) N.Y. DOM. REL. LAW par. 236, Pt. B (1) (c); Cf. *supra* note 52.

90) Foster, *supra* note 20, at 32.

91) *Id.*

92) Hessen v. Hessen, 33 N.Y.2d 406, 353 N.Y.S.2d 421, 308 N.E.2d 891 (Ct. App. 1974); See Brady v. Brady, 64 N.Y.S.2d 339, 486 N.Y.S.2d 841, 476 N.E.2d 290 (Ct. App. 1985).

93) On this ground the court ordered the equal division of marital assets in: Bisca v. Bisca, 485 N.Y.S.2d at 304; Brundage v. Brundage, 100 A.D.2d 887, 474 N.Y.S.2d 546, at 548 (2d Dep't 1984); Perri v. Perri, 467 N.Y.S.2d at 228; Ryan v. Ryan, 123 A.D.2d 679, 506 N.Y.S.2d 979, at 979 (2d Dep't 1986); Schussler v. Schussler, 109 A.D.2d 875, 487 N.Y.S.2d 67, at 70 (2d Dep't 1985); Sementilli v. Sementilli, 477 N.Y.S.2d at 634; Jolis v. Jolis, 446 N.Y.S.2d at 150; Mc Dermott v. Mc Dermott, 474 N.Y.S.2d at 223; Nehorayoff v. Nehorayoff, 437 N.Y.S.2d at 591.

94) DRL, *supra* note 26, at 277.

95) Zuch v. Zuch, 503 N.Y.S.2d at 347.

96) Kobylack v. Kobylack, 442 N.Y.S.2d at 393.

97) *Id.* at 394; Cf. factor six.

the parties' economic contributions[98]). Because of the shortness of the marriage, the court states, we must forbid a spouse to profit because he or she was married to somebody possessing a greater income of assets[99]). In *Wilson v. Wilson* (Appellate Division 1984) the dissent asserts that equitable distribution was not intended to be a bonanza[100]). "For equitable distribution purposes, the fact of marriage, in and of itself, does not automatically vest property rights in the other spouse's estate, irrespective of considerations of fairness and equity and the factors enumerated in DRL par. 236, Pt. B. Rather, equitable distribution has, as its basis, the distribution of marital property, keeping in mind 'direct or indirect contribution ... by the party not having title ...' [DRL par. 236, Pt. B (5) (d) (6)]. Here the record does not reflect any such effort or contribution ... This is a marriage of short duration which did not work and should not result in either a penalty or a reward. The only equitable disposition would be to return the parties to the *status quo ante*"[101]). The Appellate Division (1985) in *Cappiello v. Cappiello* states that the marriage lasting only eight months quite simply did not work[102]). Since the marital property was acquired as result of the husband's efforts[103]) and the wife was able to earn at least $ 40,000 per year in the future[104]), the wife was awarded only twenty-five percent of the marital property. The wife in *Jeruchimowitcz v. Jeruchimowitcz* (Sup. Ct. New York Cty 1985) was granted seventy-five percent of the assets, due to the relatively short duration of the marriage and the apparently good health of both parties, particularly because she was orginally in sole possession[105]).

There are some decisions that explicitly consider the fact that the marriage is childless, as an element which gives more importance to the fact that the marriage was of a short duration[106]).

21. The age and health of the parties are considered in several cases[107]) Both aspects are relevant to consideration of the future financial conditions of the parties. In *Cohen v. Cohen* (Appellate Division 1984) the wife is awarded fifty percent of the proceeds of the sale of the marital residence because this will provide her with a financial cushion until her *health* will permit her to work full-time and will assist her to find suitable housing for herself and her son[108]). In *Cunningham v. Cunningham* (Appellate Division 1984) it is the *age* of the wife

98) *Id.*

99) Cf. factor thirteen: Cappiello v. Cappiello, 488 N.Y.S.2d at 400.

100) Wilson v. Wilson, 476 N.Y.S.2d at 128.

101) *Id.*

102) Cappiello v. Cappiello, 488 N.Y.S.2d at 400, cf. *infra* factor thirteen.

103) Cf. factor six; This case has not been treated in the discussion of the sixth factor.

104) Cf. factor eight.

105) Jeruchimowitcz v. Jeruchimowitcz, 491 N.Y.S.2d at 580; For other reasons cf. factors one, two, five. six, seven, eight and thirteen.

106) Alwell v. Alwell, 471 N.Y.S.2d at 902; Duffy v. Duffy, 94 A.D.2d 711, 462 N.Y.S.2d 240, at 242 (2d Dep't 1983); Michalek v. Michalek, 494 N.Y.S.2d at 488.

107) Rather briefly in: Alwell v. Alwell, 471 N.Y.S.2d at 902 (good health and relative youth); Lischinsky v. Lischinsky, 501 N.Y.S.2d at 941 (wife is 56 years old and has back problems); Wilson v. Wilson, 476 N.Y.S.2d at 123 (plaintiff is relatively young); Jeruchimowitcz v. Jeruchimowitcz, 491 N.Y.S.2d at 580 (apparent good health of both parties); Jolis v. Jolis, 446 N.Y.S.2d at 150 (wife is 66 years old); Kobylack v. Kobylack, 442 N.Y.S.2d at 393 (healthy people) and at 394 (still very young); Mc Dermott v. Mc Dermott, 474 N.Y.S.2d at 223 (husband is 62 years old, wife 59 years and has a poor health); Nehorayoff v. Nehorayoff, 437 N.Y.S.2d at 591 (both parties are generally in good health with no prospect of any significant change).

108) Cohen v. Cohen, 104 A.D.2d 841, 480 N.Y.S.2d 358, at 362 (2d Dep't 1984).

(44 years compared with the 37 years of the husband) which allows the court to consider that it makes her future earning capacity of shorter duration and also the period in which she can contribute to a pension fund[109]).

The Appellate Division (1985) in *Bisca v. Bisca* equally divided the marital property, notwithstanding the husband's poor health, because of the long duration (25 years) of the marriage[110]) and the fact that both spouses equally contributed[111]) to the marriage[112]). Despite the short duration of the marriage[113]) and the minimal contributions of the wife to home and household[114]), a court awarded the wife a fifty percent interest in the marital residence because she was older and had been out of the job market for a significantly long time (Appellate Division [1984] in *Rubin v. Rubin*)[115]). The Supreme Court in *Wenzel v. Wenzel* considered the serious mental illness of the husband to be no excuse for his acts of cruel and inhuman treatment[116]).

3.2.1.c. Factor 3

"the need of the custodial parent to occupy or use the marital residence and to use or own its household effects."

22. This factor requires the court to balance the interest and need for money by selling the marital residence at the time of the divorce against the interests of the children and their custodian, requiring that the home and its furnishings remain intact while the children develop and mature[117]). The court has authority to award exclusive occupancy and possession of the marital residence, regardless of title or marital fault, as opposed to New York's prior law[118]).

The question is when is it appropriate for the court to provide that one of the spouses be given the exclusive occupancy of the marital residence. In *Cassano v. Cassano,* the Appellate Division (1985) states that in making a decision regarding the marital residence, the court must consider the wife's need, as custodial parent to occupy the marital residence during the children's minority[119]). The court continues that the judge also must take into account whether the wife's living expenses would be less if she remained in the home and whether the children had lived in the marital residence all their lives[120]). It is clear that the purpose of this provision is to give the court the flexibility to minimize the disruption of the lives of minor children and to preserve their home environment[121]).

109) Cunningham v. Cunningham, 482 N.Y.S.2d 148.
110) Cf. factor one.
111) Cf. factor six.
112) Bisca v. Bisca, 108 A.D.2d 773, 485 N.Y.S.2d 302, at 304 (2d Dep't 1985); app. dismd 66 N.Y.S.2d 741, 497 N.Y.S.2d 364, 488 N.E.2d 111.
113) Cf. factor one: this case has not been discussed under this previous factor.
114) Cf. factor six.
115) Rubin v. Rubin, 105 A.D.2d 736, 481 N.Y.S.2d 172, at 175 and 176 (2d Dep't 1984).
116) Wenzel v. Wenzel, 122 Misc. 2d 1001, 407 N.Y.S.2d 830, at 834 (Sup. Ct. Suffolk Cty 1984); Cf. factors three, five, six, ten, eleven and especially thirteen.
117) DRL, *supra* note 26, at 277.
118) Foster, *supra* note 20, at 35.
119) Cassano v. Cassano, 111 A.D.2d 208, 489 N.Y.S.2d 243, at 245 (2d Dep't 1985).
120) Cassano v. Cassano, *id.*: referring to Patti v. Patti, 99 A.D.2d 772, 472 N.Y.S.2d 20 (2d Dep't 1984); Hillmann v. Hillmann, 486 N.Y.S.2d at 89: immediate sale of marital residence is improper because the cost of maintaining the present residence is approximately equal to the cost of acquiring a new residence for the custodial parent and the children *in the surrounding area* (emphasis supplied).
121) DRL, *supra* note 117.

23. There are two scenario's. In the first situation there are still minor children. If the custody for the children was awarded to one of the parents, the court can award the custodial parent the exclusive occupancy of the marital residence, if the need exists. The Appellate Division in *Wobser v. Wobser* (1982) states very clearly that an award of exclusive possession of the marital premises is improper and that sale of it should be ordered at time of the judgment of divorce, unless one spouse demonstrates an *overriding* need to occupy the marital residence[122]). As in *Cassano v. Cassano* the Appellate Division (1985) in *Mc Dicken v. Mc Dicken,* holds that the need of the custodial parent to occupy the marital residence is conditioned upon having a child of not twenty-one years old or not emancipated[123]). If the court allows exclusive possession on the ground of the need of a custodial parent, then the order will be limited to a period until the youngest child becomes twenty-one or emancipated. A decision of exclusive possession "until such time as this court shall otherwise order" was found to be an abusement of discretion[124]). There are several decisions awarding one of the parents the exclusive possession of the marital residence because of their need as a custodial parent[125]).

If joined or shared custody of children is decreed, on an equal or near equal basis, the court often orders an immediate sale of the property[126]). In *Tanner v. Tanner,* the Appellate Division (1985) decides that the net proceeds must be equally divided between the parties because both parties are similarly situated with each having custody over one child[127]). Foster remarks that in this situation the overall situation should determine whether or not factor three has any significance or weight in the balancing process[128]). In *Nehorayoff v. Nehorayoff,* the Supreme Court of Nassau Cty (1981) decides that a second reason to deny an award for exclusive use or occupancy of the marital residence is the fact that the house is far too large for their needs[129]).

24. The second situation exists when there are no minor children. In *Jolis v. Jolis* (Supreme Court New York Cty [1981]) there was no need for the wife to use the marital residence as a custodial parent, for the four sons were emancipated and self-supporting[130]). In these factual circumstances the third factor is out of play and, repeating Foster[131]), the overall situation should determine whether or not an award of exclusive possession of the marital residence would be appropriate. In the case at bar the court allowed the wife to occupy the marital residence (an apartment in Paris) exclusively for three years, since she was very emotionally

122) Wobser v. Wobser, 91 A.D.2d 826, 458 N.Y.S.2d 113 at 114 (4th Dep't 1982).
123) The majority age is twenty-one in New York (N.Y. DOM. REL. LAW, Par. 2); Mc Dicken v. Mc Dikken, 109 A.D.2d 734, 486 N.Y.S.2d 52 (2d Dep't 1985): referring to Troiano v. Troiano, 87 A.D.2d 588, 447 N.Y.S.2d 753 (2d Dep't 1982); see Sementilli v. Sementilli, 477 N.Y.S.2d at 633.
124) Mc Dicken v. Mc Dicken, *id.*
125) Hillman v. Hillmann, 486 N.Y.S.2d at 89; Hopper v. Hopper, 103 A.D.2d 911, 478 N.Y.S.2d 147, at 148 (3d Dep't 1984); Knapp v. Knapp, 483 N.Y.S.2d at 461; Van Housen v. Van Housen, 494 N.Y.S.2d at 136; Ettinger v. Ettinger, 107 Misc. 2d 675, 435 N.Y.S.2d 916 (Sup. Ct Nassau Cty 1981); see Flanagan v. Flanagan, 500 N.Y.S.2d at 34–35, limiting the exclusive possession and occupancy of marital residence for wife with custody over the two children, to two years.
126) Rubin v. Rubin, 481 N.Y.S.2d at 175; Tanner v. Tanner, 484 N.Y.S.2d at 703; Nehorayoff v. Nehorayoff, 437 N.Y.S.2d at 591.
127) Tanner v. Tanner, *id.;* Nehorayoff v. Nehorayoff, *id.*
128) Foster, *supra* note 20, at 37.
129) Nehorayoff v. Nehorayoff, *id.* at 592.
130) Jolis v. Jolis, 446 N.Y.S.2d at 145.
131) Foster, *supra* note 128.

attached to it because of her Western European heritage, friendship and language fluency[132]). The court decided she could occupy the apartment during three years as a reasonable transitional period of adjustment to her newly divorced status[133]).

In *Kobylack v. Kobylack,* the Supreme Court of Westchester County (1981) holds that since there are no children, there is no necessity with respect to occupying the marital premises[134]). However a factor to be considered is the fact that plaintiff expressed desire to remain in possession of the house while defendant did not[135]).

In *Bizzaro v. Bizzaro* (Appellate Division 1984) the court held that the mere fact of cohabitation should not serve to divest the possession of the marital residence and trial court should not consider such in making its distribution[136]).

25. It seems that in none of the situations where the court decides to award exclusive occupancy to a spouse is this done by conveyance of title. Indeed this may result in an injustice if the marital home and the furnishings constitute the bulk of the marital assets, and the awarded spouse lacks the ability to transfer property which could equitably recompense the other spouse for his or her equitable share of the residence[137]).

Almost always, the exclusive occupancy is only a delay of the disposition of the marital residence until the children are grown, or until the period of adaptation as in *Jolis v. Jolis*[138]) is over. Major assets of the marriage remain frozen for what may be a considerable period of time. In this sense the injustice remains, since the non-awarded spouse is effectively deprived of the use or transferability of his or her interest in the property[139]). If the court directs this postponement of the sale in the future, it may nonetheless provide for the manner in which the proceeds of such future sale are to be divided[140]).

There is however one case where the wife did get the title to the house (and the exclusive ownership of its furnishings). In *Wenzel v. Wenzel* the Supreme Court of Suffolk County (1984) awarded the marital premises to the wife because it was clear that she and the children had a need to it and that the husband did not[141]). The special circumstances of this case (the mentally ill husband tried to kill the wife) will be discussed infra under factor thirteen. It should be noticed that the time-limit on the exclusive occupancy as pointed out in *Mc Dicken v. Mc Dicken* does not apply here[142]). The court specifies that the wife has the right to sell the house whenever she wants or needs to[143]). It goes further saying that she may retain all the equity from such sale because the husband has no need for such funds. But whatever right he might have had, continues the court, he had forfeited in his attack upon plaintiff[144]).

132) Jolis v. Jolis, *id.*
133) *Id.*
134) Kobylack v. Kobylack, 442 N.Y.S.2d at 393.
135) *Id.*
136) Bizzaro v. Bizzaro, 106 A.D.2d 690, 480 N.Y.S.2d 144, at 146 and 147 (3d Dep't 1984); Cf. factor thirteen.
137) DRL, *supra* note 26, at 277.
138) Jolis v Jolis, *supra* note 130.
139) DRL, *supra* note 137; Foster, *supra* note 128.
140) Ettinger v. Ettinger, *id.* (seventy-five percent for the wife); Jolis v. Jolis, *id.* (fifty-five percent for the husband and forty-five percent for the wife).
141) Wenzel v. Wenzel, 122 Misc. 2d 1001, 472 N.Y.S.2d 830, at 836 (Sup. Ct. Suffolk Cty 1984).
142) Mc Dicken v. Mc Dicken, *supra* note 123.
143) Wenzel v. Wenzel, *id.*
144) Wenzel v. Wenzel, *id.* at 637.

The dissent in *Jolis v. Jolis,* Appellate Division (1983) also wanted to give the Paris apartment permanently and entirely to the wife[145]). The majority however joins the trial court in deciding that the apartment must be sold after three years and the proceeds distributed according to the trial court's calculations[146]). The court rules that otherwise the apartment will continue to be a bone of contention between the parties[147]). It also would materially upset the delicate equitable distribution meticulously worked out by the trial court[148]).

3.2.1.d. Factor 4

"the loss of inheritance and pension rights upon dissolution of the marriage as of the date of the dissolution".

26. This factor opens the door for some consideration of separate property since that property would qualify for inheritance purposes[149]). In *Kobylack v. Kobylack,* the Supreme Court of Westchester County (1981) considers the fact that each party loses the right to inherit from the other[150]). However, the Court states that there appears to be no separate property to make such a loss presently meaningful[151]). One of the reasons for the equal distribution in *Jolis v. Jolis* (Supreme Court New York County, 1981) was the loss of the wife's inheritance rights upon dissolution of the marriage[152]).

27. What about the loss of pension rights? In *Majauskas v. Majauskas,* Court of Appeals (1984), the husband's contention is that according to this factor his wife loses her rights in his pension upon dissolution of the marriage[153]). However a distinction must be made between pension benefits earned during the marriage and pension benefits earned prior to the marriage. The first are marital property, the latter separate property[154]). Any right or expectancy of the wife in pension rights of her husband other than those that constitute marital property would be lost upon divorce[155]). The loss of pension rights in factor four must thus be read as speaking to the loss of the nonemployee's independent rights, which are essentially equivalent to inheritance rights, not to loss of the employee spouse's pension rights acquired during marriage, for otherwise even matured pension rights, though clearly marital property, would be excluded[156]).

The Appellate Division in *Puzzi v. Puzzi* (1984) corrects in this light the error of the trial court that awarded fifty-six percent of the net proceeds of the sale of the marital residence to the wife because of her loss of pension rights upon dissolution of the marriage[157]). The court states that this statutory factor may not be read as excluding from the definition of marital

145) Jolis v. Jolis, 98 A.D.2d 692, 470 N.Y.S.2d 584, at 588 (1st Dep't 1983).
146) Jolis v. Jolis, *id.* at 586.
147) Jolis v. Jolis, 470 N.Y.S.2d at 586.
148) *Id.*
149) Martinez v. Martinez, N.Y.L.J., October 13, 1981, p. 17, col. 5 (Sup. Ct. Nassau Cty 1981).
150) Kobylack v. Kobylack, 442 N.Y.S.2d at 393.
151) *Id.*
152) Jolis v. Jolis, 446 N.Y.S.2d at 150.
153) Majauskas v. Majauskas, 61 N.Y.S.2d 481, 463 N.E.2d 15, at 19 (Ct. App. 1984).
154) *Id.*
155) *Id.* at 21.
156) *Id.*
157) Puzzi v. Puzzi, 101 A.D.2d 884, 476 N.Y.S.2d 355 (2d Dep't 1984).

property pension benefits attributable to employment during marriage[158]). The trial court should have made an equitable distribution of those net proceeds and of the husband's vested pension[159]).

In *Sementilli v. Sementilli,* the Appellate Division (1984) could not determine a distribution reflecting the husband's pension rights because there was no evidence submitted upon which to determine this division[160]). But even though no award was made to the wife out of the husband's pension, the result was not inequitable[161]).

3.2.1.e. Factor 5

"any award of maintenance under subdivision six of this part"

28. This factor is intended to direct the court's attention to the overall financial package that results from the decision[162]). This is very clear in the opinion of the Appellate Division (1984) in *Wilson v. Wilson*[163]). In this case the husband is a hospital doctor who was asked by plaintiff, his ex-wife, to provide for three years medical insurance for her under the hospital plan. The court says that it would impose a substantial financial burden on defendant-husband to provide medical insurance coverage for three years for plaintiff, who is neither his wife nor an employee of the hospital, since she is no longer entitled to family coverage under these group plans. Therefore the court states that "the problem can best be met by giving it consideration both in fixing the weekly maintenance and in connection with determining the lump sum payment, this providing an appropriate vehicle to remedy the cut-off of such coverage"[164]).

29. Where an award has been made the payor spouse may be granted a greater share of marital property in order to assure that spouse of sufficient means and assets to fund the award, especially where the property is income-producing[165]). The needy spouse on the other hand, may require less marital property where the award is significant and of long duration[166]).

The greater or lesser share is to be calculated in view of the part of the assets that this spouse otherwise would have had, if there were no maintenance award, and not in light of a maximum level of fifty percent for each. Indeed, we are dealing with an equitable and not an equal distribution of the marital property. So the court in *Tanner v. Tanner,* Appellate Division (1985) equally divided the marital assets, thereby awarding the husband a greater share than he otherwise would have had, because his maintenance payments to defendant-wife were available as a means of equalizing buying power[167]). Despite the maintenance she was awarded, the wife in *Jolis v. Jolis* (Supreme Court New York Cty 1981), was still entitled to an equal share of the marital property because of, among other reasons (see factors one, three, seven, eights and

158) *Id.*
159) *Id.*
160) Sementilli v. Sementilli, 477 N.Y.S.2d at 634.
161) *Id.*
162) Foster, *supra* note 20, at 40; DRL, *supra* note 26, at 279; See Mc Dicken v. Mc Dicken, 486 N.Y.S.2d at 54: equitable distribution of marital property should be taken into account in fixing the maintenance amount because this distribution will affect plaintiff's future income.
163) Wilson v. Wilson, 476 N.Y.S.2d at 124.
164) *Id.*
165) Foster, *supra* note 162; DRL, at 279.
166) *Id.*
167) Tanner v. Tanner, 484 N.Y.S.2d at 703.

ten), the loss of the award if her husband predeceased her and the extent of her maintenance award in a continuing inflationary economy[168]).

Wenzel v. Wenzel (Supreme Court Suffolk County, 1984) is again an exceptional case, not following the general rules pointed out *supra*[169]). Despite the wife being awarded maintenance and child support, she receives one hundred percent of the marital property. The reason given by the court is that the maintenance and child support will probably be uncollectible during the period of defendant's incarceration[170]). The court adds that defendant-husband may apply for modification upon release[171]).

The Appellate Division in *Zuch v. Zuch* (1986) decided that it was completely proper for plaintiff-wife to waive any claim for maintenance in exchange for an equitable share of the apartment[172]). Thus, trial court mistakenly determined that maintenance had been waived outright[173]).

Because no maintenance was sought or warranted, the Supreme Court of New York County (1985) awarded the wife seventy-five percent of the marital assets in *Jeruchimowitcz v. Jeruchimowitcz*[174]).

30. It should be noted that the court is not expressly empowered to consider the effect of an award of child support[175]). Of course, if necessary, the court may take the effect of such award into account by resort to the catch-all provision of factor thirteen[176]).

3.2.1.f. Factor 8

"the probable future financial circumstances of each party"

31. The court must make an informed[177]) prediction as to how each spouse is likely to fare economically in the future. The Appellate Division (1986) in *Erdheim v. Erdheim* finds a distributive award of sixty percent of the marital assets and sole ownership of the marital residence for the wife fair and equitable[178]), because of the disparity in the earning potential of the wife, who more than likely would obtain limited earnings if she returned to her profession as a teacher, as compared to the husband's "virtually unlimited" potential through his proven sales ability[179]). The court in *Tanner v. Tanner* (Appellate Division 1985) ordered the husband to pay the wife her equitable share of his pension rights within three years of the entry of the order

168) Jolis v. Jolis, 446 N.Y.S.2d at 150.
169) Cf. factor three.
170) Wenzel v. Wenzel, 472 N.Y.S.2d at 835.
171) *Id.*
172) Zuch v. Zuch, 503 N.Y.S.2d at 347.
173) *Id.*
174) Jeruchimowitcz v. Jeruchimowitcz, 491 N.Y.S.2d at 580.
175) DRL, *supra* note 26, at 279.
176) *Id.;* Cf. factor thirteen.
177) Employment histories would be helpful in assessing parties' probable future financial circumstances (Willis v. Willis, 484 N.Y.S.2d at 311). However they are but one of the many components of the parties' respective future financial circumstances and should be considered accordingly.
178) With his demonstrated ability as a money maker the husband can go out and earn more (see Foster, *supra* note 20, at 48). The factor has more significance where the husband has retirement and pension benefits, stock options or deferred compensation. Where possible, the financial security of the wife in such cases should be given priority.
179) Erdheim v. Erdheim, 501 N.Y.S.2d at 79.

based on its decision, with interest from the date of the commencement of the divorce action, considering the probable future circumstances of the parties[180]).

32. It is clear that several other factors will come into play in this factor and will give it enhanced significance or not[181]). In *Kobylack v. Kobylack* (Sup. Ct. Westchester Cty 1981), where the only relevant factor is found to be the parties' economic contribution[182]), the court determines that there will be no abrupt change in the financial circumstances barring unforeseen circumstances[183]). Neither party's ability to earn a living has been improved by the marriage[184]). They have both proceeded in their chosen careers in exactly the same manner as if they were not married[185]). The court concludes that neither party's future has been affected as a consequence of the marriage[186]).

Despite the future economic hardship of the husband to pay child support, tax, mortgage and insurance expenses the *Knapp v. Knapp* court (Appellate Division 1984) found the third factor (need of custodial partent) to be more important, and awarded exclusive possession of the marital residence to the wife, the custodial parent[187]).

33. It is especially the second factor (duration of the marriage, age and health of the parties) which is important here[188]). There are several cases with the classical elements (a long marriage, a wealthy husband with an ongoing earning potential, an older woman out of the job market for a long time and sometimes with a poor health [without or with a very tiny earning capacity]), where the court equally distributed the marital assets on these grounds[189]).

On the other hand, if the marriage was of short duration, the wife is relatively young and in good health and she has an ability to earn enough to support herself, the result will be totally different and determined by other factors than two and eight. In *Cappiello v. Cappiello* (Appellate Division 1985) it is the fact that most of the marital property was acquired as result of the husband's efforts (factor six)[190]) which justifies the reduced share of twenty-five percent for the wife[191]). In *Jeruchimowitcz v. Jeruchimowitcz* (Sup. Ct. New York Cty 1985) several factors[192]), but especially the fact that the wife in this relatively short marriage with both parties apparently in good health[193]) was originally in sole possession of the apartment[194]), caused the court to award the wife seventy-five percent of the net proceeds of the sale of the apartment[195]). The short duration of the marriage (one and a half year) and relative youth and capability of self-support of the wife[196]) in *Wilson v. Wilson* (Appellate Division 1984) do not preclude her from a right to a share of the marital property[197]). She is worse off economically since the marriage, and needs some time to obtain improvement[198]) Moreover she went into debt to obtain furnishings and clothing due to defendant-husband's retention of her private property[199]). The court states that it must consider the disruption of her life[200]) affecting her job and its prospects[201]), as well as her place of abode[202]).

180) Tanner v. Tanner, 484 N.Y.S.2d at 703.
181) Or no significance at all as in Kobylack v. Kobylack.
182) Cf. factor six.
183) Kobylack v. Kobylack, 442 N.Y.S.2d at 393.
184) *Id.* at 394.
185) *Id.*
186) *Id.*
187) Knapp v. Knapp, 483 N.Y.S.2d 461.
188) DRL, *supra* note 26, at 281; Foster, *supra* note 20, at 47: giving a remarkable example from Connecticut.
189) Perri v. Perri, 467 N.Y.S.2d at 228; Sementilli v. Sementilli, 477 N.Y.S.2d at 634; Mc Dermott v. Mc Dermott, 474 N.Y.S.2d at 223; Jolis v. Jolis, 446 N.Y.S.2d at 150.
190) This case has not been discussed under the sixth factor.
191) Cappiello v. Cappiello, 488 N.Y.S.2d at 400; Cf. factor two: marriage of only eight months, and factor eight: wife's ability to earn at least $ 40,000 a year in the future.
192) Cf. factors five and six.
193) Cf. factor two.
194) Cf. factor thirteen.
195) Jeruchimowitcz v. Jeruchimowitcz, 491 N.Y.S.2d at 580.

3.2.2. Factor geared towards contribution: factor 6

"any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career and career potential of the other party."

34. This factor is primarily geared to the traditional family[203]). One spouse (the husband?) is the breadwinner and the other (the wife?) remains at home to care for the children and manage the household[204]). The main idea is that the non-monetary contributions to a marriage are vital. A homemaker spouse's effort must be taken into account when marital property is divided.

35. A first problem is whether this factor is exclusively meant for parties with a claim to marital property, but not having title thereof. In *Kobylack v. Kobylack* (Supreme Court Westchester County, 1981) the defendant argues that factor six, by dealing specifically with property not held jointly, eliminates the jointly held property from the court's consideration[205]). This reasoning implies that property held by parties as tenants by entirety automatically requires an equal division. The court does not accept the view because factor thirteen allows the court to divide the realty equitably. Moreover, continues the court, in the light of the intention of the legislation, this failure must be deemed an oversight. For otherwise the very intention of the legislature could be subverted. Very often the house is the major asset. Inability to make adjustments in the distribution of the real property or proceeds thereof could result, concludes the court, in, inability to make equitable distribution overall.

In this light, the court finds that the contributions to the household were in proportion to the partners' income. Therefore the court states that inasmuch as there are no children to care for, both parties are healthy[206]) and capable of self-support[207]), and the ten years of marriage still leaves the parties very young[208]), it would be inequitable to distribute property on factors other than economic contributions[209]). This is the rare case where the only relevant considera-

196) Cf. factor 2.
197) Wilson v. Wilson, 476 N.Y.S.2d at 124.
198) *Id.*; Cf. factor eight.
199) *Id.*; This will affect albeit slightly her future financial circumstances, factor eight.
200) Cf. factor 13.
201) Factor eight.
202) Wilson v. Wilson, *id.* at 126.
203) DRL, *supra* note 26, at 279.
204) *Id.*
205) Kobylack v. Kobylack, 442 N.Y.S.2d at 394.
206) Cf. factor two.
207) Cf. factor one.
208) Cf. factor two.
209) Kobylack v. Kobylack, *Id.*

tion is the economic aspects of the marriage[210]). The court holds that its primary obligation in distributing the marital assets of this particular marriage is to ensure that neither party secures a monetary advantage merely by virtue of having been married to the other[211]).

36. The court must consider the direct economic contributions to the acquisition of marital property of the nontitle-holding spouse (or of the joint title-holding spouse) as a wage earner[212]).

One of the reasons why most of the value of the property was awarded to the wife in *Ackley v. Ackley* (Appellate Division, 1984) was that the husband had made only a very limited economic contribution to the property[213]).

The Supreme Court of New York County (1985) stated in *Jeruchimowitcz v. Jeruchimowitcz* that it is not the role of the court to trace the path of each dollar spent by the spouses to make them whole[214]). The parties pooled their incomes to defray living expenses. In this economic partnership, the court notes, one spouse's paying a particular expense allowed the other's money to be available for another expense, affording both a higher standard of living than they could enjoy separately[215]).

37. An equitable claim to a share of marital property to which title is held by the other spouse may also arise from another kind of direct contribution made by the nontitle-holding spouse to the acquisition or improvement of the property at issue[216]).

In *Cohen v. Cohen* (Appellate Division 1984) plaintiff-wife is awarded a fifty percent interest in the marital residence because she made substantial monetary contributions to the downpayment to purchase the house[217]).

The wife in *Cunningham v. Cunningham* (Appellate Division 1984) who contributed substantially from her separate property toward the creation and reparation of the marital residence receives credits for these contributions[218]). These credits are deducted from the amount, representing the value of the marital residence, subject to equitable distribution. Because of

210) *Id.;* Michalek v. Michalek, 494 N.Y.S.2d at 488: husband earning 2/3 of combined incomes, while parties contribute financially to living expenses and accretion of property in proportion to their earnings, gets 2/3 of the marital assets; Cf. factor one.

211) *Id.;* See Barnes v. Barnes, 106 A.D.2d 535, 483 N.Y.S.2d 358, at 360 (2d Dep't 1984). Because of the minimal economic and non-economic contributions of the husband to the marital residence and his financial irresponsible behaviour (cf. factor eleven) the wife was awarded one hundred percent of the property. To provide the husband any equitable share would provide him with an economic advantage merely by virtue of the fact that he was married to the wife.

212) Bisca v. Bisca, 485 N.Y.S.2d at 304; Cohen v. Cohen, 480 N.Y.S.2d at 361; Day v. Day, 112 A.D.2d 922, 492 N.Y.S.2d 783, at 785 (2d Dep't 1985); Harness v. Harness, 99 A.D.2d 658, 472 N.Y.S.2d 234, at 235 (4th Dep't 1984); Sorrentino v. Sorrentino, 497 N.Y.S.2d at 423; Ettinger v. Ettinger, 435 N.Y.S.2d 916; Wenzel v. Wenzel, 472 N.Y.S.2d at 835; see also Ward v. Ward, 463 N.Y.S.2d at 636: substantial non-economic contribution of the wife working for the husband in his automobile appraisal business as a secretary and bookkeeper, without salary.

213) Ackley v. Ackley, 100 A.D.2d 153, 472 N.Y.S.2d 804, at 806 (4th Dep't 1984); Cf. factor thirteen.

214) Jeruchimowitcz v. Jeruchimowitcz, 491 N.Y.S.2d at 580.

215) *Id.*

216) Harness v. Harness, 472 N.Y.S.2d at 235; Ryan v. Ryan, 506 N.Y.S.2d at 979; Sorrentino v. Sorrentino, 497 N.Y.S.2d at 423; Ettinger v. Ettinger, 435 N.Y.S.2d 916: seventy-five percent for the wife because she contributed with separate property to fifty percent of the purchase price and had made contributions as house-wife and part-time salaried employee.

217) Cohen v. Cohen, 480 N.Y.S.2d at 362.

218) Cunningham v. Cunningham, 482 N.Y.S.2d at 149 and 150.

the full responsibility she has for the maintenance of the house, the trial court grants the wife ninety percent of the net proceeds of the sale of the residence[219]). Remark that the trial court only gave a credit for the repairs (some $ 9,000) and not for the $ 27,000 she contributed to the purchase price. This explains why the Appellate Division which gave the last credit, increased the distribution sixty-five percent for the wife, justifying this greater share of the wife by her older age[220]) and her responsibility to care for her mother[221]).

38. The husband in *Zuch v. Zuch* (Appellate Division 1986) entered into a contract to purchase cooperative shares in an apartment prior to the marriage and signed the contract alone[222]). He made the down-payment out of his funds. The wife, however, contributed more than fifty percent of the purchase price and almost fifty percent of the alternations, improvements and decoration of the apartment, performed under her supervision. The decision of the trial court that the shares were the husband's separate property and that the wife's contributions constituted a loan was modified by the Appellate Division on several grounds[223]), inter alia because of her substantial contributions[224]). The apartment was found to be marital property and the wife was entitled to an equitable share of it[225]).

39. An equitable claim to a share of marital property to which title is held by the other spouse may also arise from an indirect contribution made by the nontitle-holding spouse. An indirect contribution might be found in the renovation work of the husband on the home, which was joint property of the spouses as tenants by entirety[226]). The Appellate Division (1984) in *Parsons v. Parsons* held that the husband would receive credit for the value of this work, for the purpose of property distribution[227]).

An important application of the indirect contribution is the case where the spouse remains home to take care of the children and to maintain the household. Thereby he or she frees the other spouse to pursue economic activity which leads to the acquisition of marital property, though held solely in the name of the economically active spouse[228]). The Appellate Division (1983) decided in *Conner v. Conner,* that the partnership theory prevails in distribution of fruits through efforts of spouses during the marriage[229]). The non-directly related efforts of the homemaker spouse are deemed to have enabled the other spouse to engage in other efforts that were so related[230]).

Whether these fruits are derived from efforts utilizing separate or marital property is irrelevant[231]). However, the Appellate Division (1986) in *Zacharek v. Zacharek* held that it is right to consider the origin of the property to achieve an equitable distribution[232]). Here the wife

219) *Id.* at 149.

220) Cf. factor two.

221) Cf. factor thirteen.

222) Zuch v. Zuch, 503 N.Y.S.2d at 347.

223) Cf. factors one, two, five and thirteen.

224) Zuch v. Zuch, 503 N.Y.S.2d at 347.

225) *Id.*

226) Parsons v. Parsons, 101 A.D.2d 1017, 476 N.Y.S.2d 708, at 709 (4th Dep't 1984): remitted for further proceedings to Sup. Ct. Monroe Cty and judgments as modified affirmed by A.D. (115 A.D. 289, 496 N.Y.S.2d 138 [4th Dep't 1985]).

227) *Id.*

228) DRL, *supra* note 26, at 280.

229) Conner v. Conner, 97 A.D.2d 88, 468 N.Y.S.2d 482, at 490 (2d Dep't 1983).

230) *Id.*

231) *Id.*

232) Zacharek v. Zacharek, 116 A.D.2d 1004, 498 N.Y.S.2d 625, at 626 (4th Dep't 1986).

was awarded seventy percent of the marital property because she sold separate property and deposited the proceeds in a joint account. Also, her damage award for her injuries in an automobile accident was put on this joint account[233]). In *Parsons v. Parsons* (Appellate Division 1984) the wife received a credit for the contribution of her separate property toward the creation of the marital assets[234]). A factor, allowing the Appellate Division (1984) in *Brennan v. Brennan* to decide that the allocation of forty percent of the marital property to the wife was proper, was the fact that the family business was begun by the husband and was viable before the marriage can validly be considered[235]). The fact that the wife's father contributed substantially to the marital pool, that the wife purchased the cooperative shares and was originally in sole possession, and that she made actual expenditures in the purchase justifies the award of seventy-five percent of the marital property for the wife in *Jeruchimowitcz v. Jeruchimowitcz* (Appellate Division 1985)[236]).

40. The "homemaker" services of a spouse were considered in several decisions[237]). An equal division of marital property was found to be proper in two cases, although the financial contributions of the husband were greater, because the wife's homemaking services, combined with her financial contributions, entitled her to such a share[238]).

The Appellate Division (1984) in *Rubin v. Rubin* decided that there was no need for an unequal division of the jointly owned marital residence in spite of the minimal contributions of the wife to home and household[239]).

In *Duffy v. Duffy* the Appellate Division (1983) finds an equal division of the marital property in a short and childless marriage[240]) to be improper because the wife did not contribute monetarily[241]). The court adds that this is not to say that her contributions as a homemaker are being ignored[242]). Therefore she is entitled to a share of twenty-five percent.

Two decisions award the wife only twenty-five percent of a particular item of marital property, because of her very modest contributions to the particular item as a homemaker and spouse[243]).

233) *Id.*
234) Parsons v. Parsons, 476 N.Y.S.2d at 709: referring to Duffy v. Duffy, 462 N.Y.S.2d 240 (1983); Cf. factor thirteen.
235) Brennan v. Brennan, 479 N.Y.S.2d at 881.
236) Jeruchimowitcz v. Jeruchimowitcz, 491 N.Y.S.2d at 580.
237) Bisca v. Bisca, 485 N.Y.S.2d at 304; Brundage v. Brundage, 474 N.Y.S.2d at 548; Roth v. Roth, 97 A.D.2d 967, 468 N.Y.S.2d 764, at 765 (4th Dep't 1983); Schussler v. Schussler, 487 N.Y.S.2d at 70; Sorrentino v. Sorrentino, 497 N.Y.S.2d at 423; Ettinger v. Ettinger, 435 N.Y.S.2d at 416; Jolis v. Jolis, 446 N.Y.S.2d at 150; Musumeri v. Musumeri, 133 Misc. 2d 139, 506 N.Y.S.2d 629, at 632 (Sup. Ct. Suffolk Cty 1986); Nehorayoff v. Nehorayoff, 437 N.Y.S.2d at 892; Wenzel v. Wenzel, 472 N.Y.S.2d at 835.
238) Day v. Day, 492 N.Y.S.2d at 785; Harness v. Harness, 472 N.Y.S.2d at 235.
239) Rubin v. Rubin, 481 N.Y.S.2d at 175.
240) Cf. factor two.
241) Duffy v. Duffy, 462 N.Y.S.2d at 242.
242) *Id.*
243) Arvantides v. Arvantides, 483 N.Y.S.2d at 551: twenty-five share of husband's dental practice; Nehorayoff v. Nehorayoff, 437 N.Y.S.2d at 592: twenty-five percent share of husband's half interest in a Medical Center because after some minimal effort in its founding she gave no further direct contributions anymore and during the life of the Center she has been anything but the stereotypical housewife wholly devoted to the care of home, husband and offspring. She has devoted the vast bulk of her efforts to the founding and muttering of her own restaurant business.

41. Factor six also recognizes the role of the spouse who contributes to the career or career potential of the other spouse. This covers the spouse who serves as spouse, parent and homemaker, giving the other spouse the opportunity to devote all his or her energy to his or her career[244]). But it covers more specifically the spouse who cooperates actively with his or her spouse's career, for instance by procuring clients for the other spouse or even simply by talking to and being friendly with the other spouse's employer, customers, clients and business associates[245]). In *Griffin v. Griffin* the Appellate Division (1985) awarded fifty percent of the marital assets including the husband's insurance brokerage business to the wife because of her services as homemaker, but particularly because of the fact that she was partially instrumental in the procuring of approximately ninety percent of husband's business clients[246]). This aspect also covers the wife who provides the funds to enable her husband to go to Law School, or whatever education or training he wants to pursue[247]).

42. The question when a spouse may claim an equitable share of the increase in value of the other spouse's separate property, occurring during the marriage, presents another interesting issue. DRL par. 236 Pt B. (1) (d) (3) states that separate property also includes "property acquired in exchange for or the *increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse*" (emphasis added).

The Appellate Division (1985) in *Price v. Price*[248]) teaches that it is an established rule that the non-title holder is entitled to a share in the increase in value if he or she made direct contributions towards this appreciation[249]). In *Alwell v. Alwell* (Appellate Division, 1984) the wife made direct contributions to the increase in value of her husband's separate property, by reducing the mortgage debts and several improvements of the home[250]). However, trial court's equal apportionment of the appreciation was found to be inequitable because the amount of the wife's investment was only $ 1,500 while the husband's was $ 23,000. The higher court decided that trial court had to determine the proportion of the wife's investment and award her a share in the appreciation accordingly[251]).

There are however divergent views as to the indirect contributions of a homemaker, parent and spouse towards the increase in value of the other spouse's separate property[252]). In *Jolis v. Jolis* (Supreme Court New York County, 1981) the wife claims to have made contributions to the increased value of her husband's separate property (DDI stock interest) by having socially aided him in the United States and abroad, as a homemaker to enable him to devote

244) Cf. *supra* note 103; Cohen v. Cohen, 480 N.Y.S.2d at 361; Griffin v. Griffin, 115 A.D.2d 587, 496 N.Y.S.2d, at 250 (2d Dep't 1985); Jolis v. Jolis, 446 N.Y.S.2d at 147; Muller v. Muller, 116 Misc. 2d 660, 456 N.Y.S.2d 918, at 927 (Sup. Ct. Nassau Cty, 1982).
245) Jolis v. Jolis, 446 N.Y.S.2d at 147; Wood v. Wood, 119 Misc. 2d 1076, 465 N.Y.S.2d 475 at 476 (Sup. Ct. Suffolk Cty 1983); Cf. *infra* for further comments.
246) Griffin v. Griffin, 496 N.Y.S.2d at 250.
247) The medical professional license of the husband was considered to be marital property in O'Brien v. O'Brien, 66 N.Y.S.2d 516, 498 N.Y.S.2d 743, 489 N.E.2d 712 (C.A., December 26, 1985).
248) See generally Foster and Freed, *Price v. Price: The Price is Right?,* N.Y.L.J., Dec. 30, 1985, p. 3, col. 1.
249) Price v. Price, 496 N.Y.S.2d at 459.
250) Alwell v. Alwell, 471 N.Y.S.2d at 901.
251) *Id.*
252) Price v. Price, *id.*, referring to Jolis v. Jolis, 446 N.Y.S.2d 138; Wood v. Wood, 465 N.Y.S.2d 475; Question also answered in the positive by Sementilli v. Sementilli, 477 N.Y.S.2d at 629; Wenzel v. Wenzel, 472 N.Y.S.2d at 837: a share of twenty-five percent for the wife.

full time efforts to his business interests and as his frequent companion on various worldwide business trips[253]). The court however decides that the wife is not entitled to a share of the appreciation[254]). A first reason is that these efforts of the wife are primarily *indirect* and speculative. The dissent in the judgment of the Appellate Division (1983) argues that this reasoning is inconsistent with the decision of the court to distribute the marital property equally, inter alia[255]) because the wife abandoned a successful young career largely on her husband's insistence to undertake responsibility for a marital home[256]). The majority of the Appellate Division nonetheless agrees with the trial court's opinion[257]). The speculativeness of the wife's efforts lies in the fact that the increased value during the marriage was attributable to market factors. The major increase occurred as a result of the diamond fever of the market, several years after the effective break-up of the marriage[258]). A second reason the trial court denied the wife a share was the fact that the increasement was also substantially due to the management skills of the husband and some members of his family. The trial court concluded that some of the wife's activities during the period after the separation even interfered with her husband's business and social relationships, rather than being supportive to them[259]).

The Supreme Court of Suffolk County (1983) answers the argument of the husband in *Wood v. Wood* that the increase in value of his dental practice is not property subject to equitable distribution, because his wife never worked at the office nor did anything to increase the value of his separate property[260]), with the statement that the increase constitutes marital property to the extent that it is due to direct or *indirect* contributions or efforts of the non-titled spouse[261]). Then the court examines the definition of the notion "indirect". It notes that this notion normally includes the fact of appearing with the titled spouse at business related social functions or preparing social events for the business[262]). The next question is whether homemaker and parent services are also included in the concept of indirect contributions. The court answers this problem in the affirmative because marriage is a joint enterprise wherein the nonrenumerated efforts are as essential as the economic factors[263]).

The issue whether the nontitled spouse's contributions as homemaker and parent are entitled to recognition by the court in awarding this spouse a share of the appreciated value of the titled spouse's separate property occurred during the marriage, was finally decided by the Court of Appeals in *Price v. Price* in 1986[264]). The first part of the reasoning deals with the awareness, reflected in DRL par. 236, that economic success of the marital partnership not only depends upon the respective financial contributions of the partners, but also on a wide range of nonrenumerated services to the joint enterprise, such as homemaking, raising children

253) Jolis v. Jolis, 446 N.Y.S.2d at 147.
254) *Id.*
255) Cf. factors one, two, three, four, five, seven and eight.
256) Jolis v. Jolis, 98 A.D.2d 692, 470 N.Y.S.2d 584, at 588 (1st Dep't 1983).
257) *Id.* at 586.
258) Jolis v. Jolis, 446 N.Y.S.2d at 147.
259) *Id.*
260) Wood v. Wood, 465 N.Y.S.2d at 475.
261) *Id.*, at 476.
262) *Id.*
263) *Id.* at 477.
264) Price v. Price, 69 N.Y.S.2d 8, 511 N.Y.S.2d 219, at 221 (Ct. App. 1986).

and providing the emotional and moral support[265]) necessary to sustain the other spouse in coping with the vicissitudes of life outside the home[266]).

Then the Court of Appeals determines that the term marital property should be construed broadly to give effect to the economic partnership concept of the marital relationship[267]). Accordingly, separate property, in the Statute described as an exception to marital property, should be interpreted narrowly[268]). Thus, to effect the broad construction of the term marital property, it follows that the exclusion from separate property of increases in value due, in part, to contributions or efforts of the nontitled spouse should be broadly construed[269]).

Defendant, however, argues that because the legislature has specified that a court should consider contributions as a spouse, parent and homemaker in making an equitable distribution of marital property[270]), it follows that the legislature did *not* intend that a court should consider such contributions in determining whether an appreciation in separate property[271]) should be treated as marital property[272]). The court finds the argument unpersuasive, because the purpose and function of the sections at issue is distinct and not comparable[273]). The specific mention of contributions and services of a spouse as parent and homemaker in (5) (d) (6) is consistent with the detailed enumeration of the equitable considerations contained in DRL par 236, Pt. B (5) (d)[274]). DRL par 236, Pt. B (1) (d) (3) on the other hand, is part of the definition of separate properly which is to be narrowly construed[275]). Giving the words "contributions or efforts" their natural and obvious meaning as general and inclusive terms, results in expanding the extent of marital property and diminishing that of separate property[276]). An enumeration of specific types of "contributions or efforts" in (1) (d) (3) would thus be contrary to the statutory scheme of defining marital property broadly and separate property narrowly[277]).

A third point is whether the nontitled spouse must establish a causal relation between the contributions and the enhancement of the separate property assets[278]). The answer is obviously positive. In *Nolan v. Nolan,* the Appellate Division (1985) properly concluded that the indirect contributions of the wife as parent and homemaker entitled her to a share in the appreciation of securities, though they, at least in part, resulted from the time and effort that the titled spouse, while retired, devoted to their management[279]). The justification lies in the fact that her homemaker contributions were the same as if the husband was employed[280]), and it would

265) Cf. Wenzel v. Wenzel, 472 N.Y.S.2d at 835: Throughout the marriage the wife gave moral support to her husband and encouraged him to seek the necessary medical help. She supported his needs in all respects and did everything she could to sustain him in his position as a Police Officer.
266) Price v. Price, 51 N.Y.S.2d at 222.
267) *Id.;* Cf. Majauskas v. Majauskas, 61 N.Y.S.2d 481, at 489–490, 474 N.Y.S.2d 699, 463 N.E.2d 15 (Ct. App. 1984).
268) *Id.*
269) Price v. Price, *id.* at 223.
270) N.Y.DOM. REL. LAW par. 236, Pt. B (5) (d) (6).
271) N.Y.DOM. REL. LAW par. 236, Pt. B (1) (d) (3); Cf. *supra* note 52.
272) Price v. Price, *id.:* see note 3: defendant's argument is an application of the maxim "expressio unus est exclusio alterius".
273) *Id.* at 224.
274) *Id.*
275) Cf. *supra* note 52.
276) Price v. Price, *id.*
277) *Id.*
278) Price v. Price, 498 N.Y.S.2d at 461 (A.D. 1985).
279) Nolan v. Nolan, 107 A.D.2d 190, 489 N.Y.S.2d 415, at 418 (3d Dep't 1985).
280) *Id.*

be unfair that the change in employment-status of defendant-husband should render plaintiff's contributions meaningless[281]). In *Rubin v. Rubin* (Appellate Division, 1984) it was held that the wife was not entitled to share in the appreciation of value of her husband's separate business interest in a closely held corporation, since her spousal contribution during the relatively short childless marriage of seven years[282]) was limited to playing "bridge and tennis"[283]). The Court of Appeals in *Price v. Price* determines as a general rule that the appreciation remains separate property where the appreciation is not due in *any part* to the efforts of the nontitled spouse (active) but to the efforts of others (active) or to unrelated efforts including inflation or other market forces (passive), as in the case of a mutual fund, an investment in unimproved land, or in a work of art[284]). This active-passive distinction with regard to separate property has already been mentioned in *Jolis v. Jolis* and in *Nolan v. Nolan*[285]). Justice O'Connor in *Conner v. Conner* (Appellate Division, 1983) explains: "Without this active-passive management distinction, it would not be possible to characterize as marital property the appreciation of a business, owned and operated solely by the one spouse before and during the marriage which happened to be the sole object of the owner-manager's remunerative labors during marriage and the sole pecuniary support of their household"[286]). It is clear that passive appreciation of a separate property asset during the marriage would not be subject to a claim by the nontitled spouse whereas an increase in value due to the direct or indirect contributions or efforts of the nontitled spouse would be considered marital property and thus subject to such a claim[287]). The nature and measure of the services performed by the nontitled spouse as parent and homemaker and the degree to which they may have indirectly contributed to the appreciation of separate property, are matters to be weighed and decided by the trial court in making its distribution of the appreciation as marital property under DRL par. 236, Pt. B (5)[288]). The Appellate Division in *Price v. Price* indicated that this finding of a causal connection between appreciation in a separate property asset and the nontitled spouse's indirect contributions as a homemaker and parent will depend on a variety of factors including the length of the marriage, the relationship between the parties, the type of services actually performed by the nontitled spouse and the nature of the separate property[289]). The Court of Appeals however disagrees to the extent that the court, in making the determination whether to treat the appreciation in separate property as marital property, is not concerned with evaluating the contributions or efforts of the non-

281) *Id.* at 419.
282) Cf. factor two.
283) Rubin v. Rubin, 418 N.Y.S.2d at 176; See Billington v. Billington, 111 A.D.2d 203, 489 N.Y.S.2d 89 (2d Dep't 1985); Borg v. Borg, 107 A.D.2d 777, 491 N.Y.S.2d 659 (2d Dep't 1985); Lischinsky v. Lischinsky, 501 N.Y.S.2d at 924: share for wife in stock ownership and business started prior to the marriage and in appreciation in value during the marriage, denied because no direct contributions to appreciation of the business were made. Moreover there is no evidence concerning the indirect contributions by performing the household, since each of the parties baldly claims to have maintained the household with the other contributing nothing.
284) Price v. Price, 511 N.Y.S.2d at 225.
285) Nolan v. Nolan, 486 N.Y.S.2d at 418: the appreciation in value of defendant's separate property was not entirely due to random market fluctuations (see Jolis v. Jolis, 470 N.Y.S.2d at 586: "diamond fever") but as a result of active management of his holdings (see Conner v. Conner, 97 A.D.2d 88, at 99, note (4) (2d Dep't 1983); Roffmann v. Roffmann, 124 Misc. 2d 636, 476 N.Y.S.2d 713, at 715 [Sup. Ct. New York County 1983]).
286) Conner v. Conner, 97 A.D.2d at 99, note 4.
287) Price v. Price, 496 N.Y.S.2d at 462 (App. Div. 1985).
288) Price v. Price, 511 N.Y.S.2d at 225 (Ct. App. 1986).
289) Price v. Price, 496 N.Y.S.2d at 461 (App. Div. 1985).

titled spouse or with determining the extent, if any, of the appreciation due to those efforts[290]). These and the other factors mentioned by the Appellate Division, continues the Court of Appeals, are appropriate considerations in making the equitable distribution of the appreciation as marital property[291]).

43. A last problem to be discussed under this sixth factor is the question how to value a homemaker's services. In *Jeruchimowitcz v. Jeruchimowitcz* (Sup. Ct. New York Cty 1985)[292]) it is pointed out that concerning the economic contributions of the partners as wage-earners, it is not appropriate to value each contribution exactly to the last nickel: "The role of the court is not to trace the path of each dollar spent by the spouses to make them whole. The court possesses flexibility and elasticity to mold an appropriate decree because what is fair and just in one circumstance may not be so in another"[293]).

The same rule is applicable to the indirect contributions and is quite evident here, because we never could trace the path of each dollar spent, since there are no dollars involved in these non-economic efforts. Thus, by nature of the issue itself the court will have to be flexible. However one can argue that it is necessary to appreciate concretely to some extent the non-economic contributions, for the distribution of marital property must be justified and may not be arbitrary. Foster gives several methods, such as replacement cost[294]) and lost opportunity[295]). Those approaches are highly speculative in many, if not most, cases[296]). Therefore the so called "electic" method taking into account replacement cost and lost opportunity but also other contributions such as those of a "corporate wife", tax savings and direct financial contributions will be far more convincing, says Foster[297]). However, in taking into account these last contributions the court is not valuating any more the indirect contributions of the homemaker spouse. Thus, it seems to be impossible to place a fair and just valuation upon the homemaker-services by the very nature of these services themselves[298]). How can we really value in dollars the efforts of a devoted and caring parent[299])? Could the same degree of love and concern be obtained from a paid nurse or baby-sitter[300])? The Appellate Division (1984) in *Sementilli v. Sementilli* calls any attempt to value the services of the wife impractical[301]).

Some courts considered the fact that the wife abandoned a career as an element in weighing the importance of the homemaker services[302]), but we must conclude that there is no real exact valuation method for those indirect contributions. The weight to be afforded the equitable claims based on non-economic contributions will necessarily depend on the facts of the particular case and will vary from case to case[303]). Almost every case quoted *supra* in this factor

290) Price v. Price, 511 N.Y.S.2d at 225, note (5) (Ct. App. 1986).
291) *Id.*
292) Cf. factor six.
293) Jeruchimowitcz v. Jeruchimowitcz, 491 N.Y.S.2d at 580.
294) See *supra* note 39; DRL, *supra* note 26, at 280; Foster, *supra* note 20, at 41.
295) See *supra* note 39; DRL, *supra* note 26, at 280; Foster, *id.*, at 41.
296) Foster, *id.*, at 46.
297) Foster, *id.*, at 42 and 47.
298) DRL, *supra* note 26, at 280.
299) *Id.*
300) *Id.*
301) Sementilli v. Sementilli, 477 N.Y.S.2d at 633.
302) Bisca v. Bisca, 485 N.Y.S.2d at 304; Jolis v. Jolis, 446 N.Y.S.2d at 150: wife gave up her career largely on the husband's insistence.
303) Sementilli v. Sementilli, *id.*

deals with the problem. The only general rule we can derive out of it, is that the more the spouse who maintains the home cares for the children, helps out in the other spouse's business, entertains clients, runs the myriad of daily household errands and performs the household chores, the more these non-economic services will be considered and will result in a greater share of the distributable property[304]). One case illustrates this statement very clearly. As to conventional marital property[305]) the wife in *Nehorayoff v. Nehorayoff* (Sup. Ct. Nassau Cty 1981) was entitled to fifty percent because she fulfilled her role of wife and mother very satisfactorily[306]). However, since the founding of her husband's Medical Center she had not been such a stereotypical housewife anymore and she devoted most of her efforts and time to her own business[307]). Under such circumstances the court decides that her equitable share of the Medical Center can only be twenty-five percent of her husband's half interest in the Center[308]). In *Sementilli v. Sementilli* the Appellate Division (1984) decided that, though the wife was entitled to a share of the increase in value of her husband's separate property in Italy because of her substantial homemaking and spousal services, it was improper to give her a share of his property[309]) and to divide (equally) also the proceeds of the marital residence[310]). This distribution decided by the trial court was found to complicate the disposition of property. The Appellate Court held that a fair and equitable disposition would be to direct that the property in Italy be deemed to be that of the husband (in whose name it was held) and that the marital residence in the Bronx be deemed to be that of the wife (in whose name it was held)[311]). The court added that each of the parties so considered the property[312]). In *Ward v. Ward* the Appellate Division (1983) decided that an award to the wife of the marital residence in lieu of her rights in the business of the husband was appropriate, inter alia because of the difficulty of evaluating her interest[313]).

3.2.3. Factors considering practical consequences of the distribution

3.2.3.a. Factor 7

"the liquid or non-liquid character of all marital property"

44. This factor requires the court to consider whether the various items of marital property consist of cash or can readily be converted into cash[314]). The Supreme Court (Westchester Cty 1981) in *Kobylack v. Kobylack* notices that the house and automobile can be sold readily at or near the values assigned to them by the judgment and that the Thrift Fund is cash[315]).

304) DRL, *supra* note 26, at 280.
305) Such as residence, furnishings, rings and automobiles.
306) Nehorayoff v. Nehorayoff, 427 N.Y.S.2d 584.
307) *Id.* at 592.
308) *Id.*
309) Because any attempt to value the wife's services was found to be impractical.
310) Sementilli v. Sementilli, *id.*
311) *Id.*
312) *Id.* at 627.
313) Ward v. Ward, 463 N.Y.S.2d at 636; Cf. factor nine for the other reason of the award of marital residence in stead of a share in the business.
314) DRL, *supra* note 26, at 281.
315) Kobylack v. Kobylack, 442 N.Y.S.2d at 393.

However, there may be property which cannot be readily sold[316]) or which could be sol only at a significant loss[317]). Application of this factor may be related to factor nine and ind cate that it is appropriate to order a distributive award[318]). One of the reasons[319]) to award th wife in *Jolis v. Jolis* (Sup. Ct. New York Cty 1981) a distributive award of fifty percent of th marital property[320]) was the non liquidity of most of the marital property and her need for im mediate cash[321]). In awarding the wife seventy-five percent of the net profit after the sale o the property, the Supreme Court of New York County (1985) in *Jeruchimowitcz v. Jeruchimo witcz* considered also[322]) the character of the property, a cooperative apartment[323]). In addition this factor also provides for flexibility for the court to order an allocation of marital property by physical exchange rather than reduction to cash[324]). This requires that the business and fi nancial needs of both parties be considered[325]). In *Tanner v. Tanner* (Appellate Division 1985) defendant-wife requested title to the marital residence in lieu of a pro rata share of the valu in her husband's vested pension rights[326]). The court, however, denied this claim, stating tha the courts should avoid a method of marital property distribution which permits one spouse immediate realization of equity in the assets awarded, while relegating the other spouse to a relatively long and uncertain wait for the same enjoyment[327]).

3.2.3.b. Factor 9

"the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest intact and free from any claim or interference by the other party."

45. Marital property sweeps within it all property acquired during the marriage, including interest in a professional practice or closely held business[328]). A first problem may be that there may be ethical or legal prohibitions against assigning an interest in a professional practice or license to a spouse who lacks the requisite training and experience[329]). The Appellate Division (1984) in *Rubin v. Rubin* decided that it was improper for special term to direct the husband to transfer to his former wife 100,000 shares of stock, in light of his uncontested allegation that he required control over all the family's stock to conduct the company business[330]).

316) For example an interest in a closely held business; See DRL at 281.
317) Such as stock which has sharply declined in price but which may improve in value at a later time; See Foster, *supra* note 20, at 47: with the state of the stock or real estate markets as possible significant factors.
318) N.Y.DOM. REL. LAW par. 236, Pt. (B) (5) (e); See *infra* nr. 45, note 333.
319) For other reasons: cf. factors one, two, three, four, five, six and eight.
320) Jolis v. Jolis, 446 N.Y.S.2d at 151.
321) *Id.* at 150.
322) Cf. factors one, two, five, six, eight and thirteen.
323) Jeruchimowitcz v. Jeruchimowitcz, 491 N.Y.S.2d at 580.
324) Foster, *supra* note 20, at 47: for example, the wife may get the marital home, the husband the bulk of the cash on deposit.
325) Business needs: cf. factor nine; Financial needs: cf. Jolis v. Jolis, 446 N.Y.S.2d at 150.
326) Tanner v. Tanner, 484 N.Y.S.2d at 702.
327) *Id.:* referring to Majauskas v. Majauskas, 110 Misc. 2d 323 at 326, 441 N.Y.S.2d 900, mod. on other grounds 94 A.D.2d 494, 464 N.Y.S.2d 913, affd. ad mos. 61 N.Y.2d 481, 474 N.Y.S.2d 699, 463 A.E.2d 15.
328) N.Y.DOM. REL. LAW par. 236, Pt. B (1) (c); Cf. *supra* note 52.
329) DRL, *supra* note 26, at 281.
330) Rubin v. Rubin, 99 A.D.2d 774, 472 N.Y.S.2d 24, at 25 (2d Dep't 1984): a transfer of stock could not have been directed until a hearing was conducted to determine defendant's need for the shares of stock in issue for the proper functioning of his business, the breadth of ramifications which would

Two other reasons why this assigning of interest to a former spouse can be improper were found by the court in *Ward v. Ward* (Appellate Division 1983), that considered the difficulty of evaluating the wife's interest and the feasibility of continuing a financial association between the parties[331]). Without justifying the improperness, the Supreme Court of Nassau County (1982) states in *Muller v. Muller* that it is improper to make the wife a partner in the business[332]).

The statutory solution for these problems is the distributive award technique[333]). This provision explicitly allows the court to make a distributive award of a lump sum or a periodic payment in lieu of an actual allocation of a share in a business, corporation or profession, to supplement, facilitate or effectuate a distribution of marital property[334]). This technique has been used in several decisions[335]).

Another answer to this objection to assign an interest in a business to the other spouse, may be found in *Ward v. Ward* (Appellate Division 1983)[336]). The court awarded the wife the marital residence in lieu of her rights in the business[337]).

46. A second problem is the valuation problem. It can be very difficult to place a precise value upon a business or professional practice[338]). This knowledge however is necessary to determine the value of an interest one spouse might have in such practice or business. The distributive award is only a partial solution insofar as it cannot solve this problem[339]). A valuation of the worth of the interest must be made in order to determine the amount of the distributive award.

In *Nehorayoff v. Nehorayoff* (Sup. Ct. Nassau Cty 1981) and *Muller v. Muller* (Sup. Ct. Nassau Cty 1982) the court had to value the husband's interest in a closely held business[340]). The court followed the valuation approach set forth in Internal Revenue Service Ruling 59–60 and, aided by expert testimony on both sides, arrived at a value based upon capitalization of net earnings[341]).

3.2.3.c. Factor 10

"the tax consequences to each party"

47. This factor was an express factor in maintenance, but not an express equitable distribution factor prior to the 1986 amendment[342]). However, tax consequences were considered on

likely result from the transfer sought by plaintiff, and the actual probability of a dissipation of the marital property (for this last aspect: cf. factor eleven).

331) Ward v. Ward, 463 N.Y.S.2d at 636.
332) Muller v. Muller, 456 N.Y.S.2d at 927.
333) N.Y.DOM. REL. LAW par. 236, Pt. B (5) (e).
334) *Id.*
335) Muller v. Muller, *id.* Nehorayoff v. Nehorayoff, 437 N.Y.S.2d at 592; Roussos v. Roussos, 106 Misc. 2d 583, 434 N.Y.S.2d 600, at 602 (Sup. Ct. Queens Cty, 1980).
336) Ward v. Ward, *supra* note 331.
337) This decision was based on two arguments: the difficulty of evaluating the wife's interest and the feasibility of continuing a financial association between the parties.
338) DRL, *supra* note 26, at 281.
339) Foster, *supra* note 20, at 49.
340) Muller v. Muller, *id.* at 922–927; Nehorayoff v. Nehorayoff, *id.* at 587–591.
341) *Id.*
342) 1986 N.Y.Laws, ch. 884, par. 3 [added subpar. (10) to (12) and redesignated former subpar. (10) as subpar. (13)]; See *supra* nr. 13.

a discretionary basis under former factor ten (now factor thirteen). The Appellate Divisio (1985) in *Tanner v. Tanner* decided that the husband had to pay the wife her equitable share his pension rights, considering probable future circumstances of each party, including their respective income tax liabilities[343]). The Appellate Division (1985) in *Nolan v. Nolan* directed th husband to pay the distributive award in installments in lieu of a lump sum, because of the fa that a lump sum would have severe tax consequences[344]). In *Kobylack v. Kobylack* (Appellat Division 1985) the court concludes that more consideration must be given to the tax conse quences of an immediate distribution award representing defendant-wife's equitable share c twenty-eight percent of plaintiff's "Thrift Fund"[345]). An amount equal to twenty-eight percen of plaintiff's tax liability should be subtracted from the wife's equitable share of the above por tion of the Fund, to arrive at the value of the distributive award[346]).

The Supreme Court of Richmond County (1984) noted in *Mc Dermott v. Mc Dermott* tha an equal, or substantially equal, division of marital property would result in no tax liability t either party[347]). In *Wenzel v. Wenzel* (Sup. Ct. Suffolk Cty 1984) the court does not apply th usual reasoning and formula in cases dealing with the distribution of pension rights, because o the unique facts and circumstances surrounding the case (mentally ill husband tried to kill hi wife)[348]). The court, instead, awards the woman hundred percent of her husband's pension thereby affording her the full utilization of these proceeds[349]). The court states that, if it wer not the ever deteriorating fiscal crises confronting the plaintiff-wife and the children, it woul follow the more traditional route of making the award of the pension proceeds and leave the plaintiff to seek her own means of legal avenues to actually obtain the benefits of the pensio proceeds[350]).

48. The parties should present the tax implications of their respective positions to the court so that the court at least will be familiarized with the potential tax consequences of the distribution it directs[351]). The Appellate Division (1983) in *Farsace v. Farsace* stresses that the court need not consider the tax consequences, inasmuch as no evidence was presented on this subject[352]).

3.2.4. Factors concerning economic fault

3.2.4.a. Factor 11

"the wasteful dissipation of assets by either spouse."

49. This factor too was an express factor in maintenance but, prior to the 1986 amendment, not in equitable distribution of marital property[353]). However it was considered by the

343) Tanner v. Tanner, 484 N.Y.S.2d at 703.
344) Nolan v. Nolan, 486 N.Y.S.2d at 419.
345) Kobylack v. Kobylack, 489 N.Y.S.2d at 262.
346) *Id.*
347) Mc Dermott v. Mc Dermott, 474 N.Y.S.2d at 224.
348) Wenzel v. Wenzel, 472 N.Y.S.2d at 835.
349) Cf. factors five and factor thirteen for the main reasons of this drastic decision.
350) Wenzel v. Wenzel, *id.* and at 836: "in this instance, it would be unconscionable to leave this woman in such a dilemma: Such further legal procedures would be protracted and expensive, and would completely thwart the benefit of such award".
351) DRL, *supra* note 26, at 285.
352) Farsace v. Farsace, 97 A.D.2d 951, 468 N.Y.S.2d 751 (4th Dep't 1983).
353) See *supra* note 342.

courts on a discretionary basis under former factor ten (now factor thirteen). The Appellate Division (1985) in *Willis v. Willis* decided that husband's indulging in flying and snowmobiling was not wasteful dissipation of assets, since these were pastimes in which the whole family participated[354]). The court stated that plaintiff-wife enjoyed these activities immensely and became quite involved with them. It is clear that expenditures agreed to and enjoyed by both parties should not be characterized as a waste of assets and held against one party, concluded the court[355]). The Supreme Court (Suffolk Cty 1984) in *Wenzel v. Wenzel* considers the fact that defendant-husband dissipated family assets of at least $ 27,000 as a reason among others[356]), to award hundred percent of the marital premises to the wife[357]). This dissipation of joint assets also gives the woman a right to a share of the income derived from the lease of a separate property item of the husband[358]). In *Rubin v. Rubin* (Appellate Division 1984) it was held that a transfer of shares of stock to the wife was improper until a hearing to determine "inter alia" the actual probability of a dissipation of marital property[359]). The wife in *Barnes v. Barnes* was awarded one hundred percent of the marital property, because of the husband's minimal contributions[360]) and his irresponsible financial behaviour during the marriage[361]).

50. The Appellate Division (1984) in *Blickstein v. Blickstein* distinguishes economic fault from marital fault[362]). It defines economic fault as the dissipation or secreting of assets or other conduct which unfairly prevents the court from making an equitable distribution of marital property[363]). The court explains that the two concepts are logically distinguishable from each other because marital fault cannot be transformed into economic fault by reason of its consequences[364]). In the case at bar defendant's misconduct consisted solely of his abandonment of plaintiff[365]). This is neither egregious nor outrageous and should not be considered in distributing marital property[366]). The court ends by stating that litigation of marital fault should be discouraged[367]).

In *Griffin v. Griffin*, the Appellate Division (1985) concludes that the husband is guilty of economic fault because there is overwhelming evidence that his claimed unemployment and

354) Willis v. Willis, 484 N.Y.S.2d at 310.
355) *Id.*
356) Cf. factors three, five, six, ten and thirteen.
357) Wenzel v. Wenzel, 472 N.Y.S.2d at 836.
358) *Id.* at 838: However because there is little profit resulting from the rent, the court decides that the equitable solution is to sell the property and to give plaintiff-wife a twenty-five percent share of the proceeds. The seventy-five percent for defendant can be a fund for income for defendant to pay child support if he is released. This embraces the intention of defendant expressed in his lucid moments that the Amytville property benefit the welfare of his children.
359) Rubin v. Rubin, 472 N.Y.S.2d at 25.
360) Cf. factor six.
361) Barnes v. Barnes, 494 N.Y.S.2d at 360.
362) Blickstein v. Blickstein, 99 A.D.2d 287, 472 N.Y.S.2d 110, at 114 (2d Dep't 1984); Cf. factor thirteen.
363) *Id.*; referring to Gottlieb v. Gottlieb, N.Y.L.J., June 29, 1982, p. 15, col. 1.
364) *Id.*
365) *Id.*
366) *Id.*; Cf. factor thirteen.
367) *Id.*; Cf. factor thirteen: Litigants should be allowed to remove fault from the trial except, of course, insofar as it is necessary to establish a cause of action for matrimonial relief.

poverty were contrived[368]). Referring to *Blickstein v. Blickstein,* the court rules that economic fault is a factor that may be considered in fixing an equitable distribution award[369]).

3.2.4.b. Factor 12

"any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration"

51. This factor deals with the problem of a party who seeks to place assets out of his or her control in contemplation of an action in which equitable distribution will be made[370]). This is included in the definition of economic fault given by the Appellate Division (1984) in *Blickstein v. Blickstein* ("or secreting of assets or other conduct which unfairly prevents the court from making an equitable distribution of marital property")[371]). In *Zuch v. Zuch* (Appellate Division 1986) the court accepts the contention of the wife that the husband's unemployment at time of trial was planned to thwart a large matrimonial award to her[372]). The court reverses the trial court's denial of an equitable share for the wife in the marital residence[373]).

52. To set aside the transfer the court would need jurisdiction over the transferee and a proper basis for asserting it, such as proof satisfying the requirements of the Debtor and Creditor Law[374]). Therefore, this new statutory factor allows the court, where the transfer cannot be undone, to award a greater share of any remaining property to the other spouse who has been victimized[375]).

3.2.5. Catch-all factor: factor 13

"any other factor which the court shall expressly find to be just and proper".

53. In *Muller v. Muller* (Sup. Ct. Nassau Cty 1982) the defendant attacks the constitutionality of this factor on the grounds that it fails to meet the requirements of a "Due Process Clause", as it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits, or leaves judges free to decide, without any legally fixed standards, what is proper or not in each particular case[376]). The court denies this challenge, stating that duly enacted legislation is endowed with a strong presumption of constitutionality and that the challenger has the burden of showing the contrary[377]). Moreover, says the court, the provision in DRL par. 236, as it existed prior to July 19, 1980, wherein it permitted awards of alimony as "in the court's discretion justice requires", and the New Jersey statute, which simply permits the court

368) Griffin v. Griffin, 496 N.Y.S.2d at 250; See Hickland v. Hickland, 34 N.Y.2d 1, 382 N.Y.S.2d 475, 346 N.E.2d 243, cert. denied, 429 U.S. 941, 97 S.Ct. 357, 50 L.Ed. 2d. 310.
369) *Id.*; Cf. factor thirteen.
370) DRL, *supra* note 26, at 285.
371) Blickstein v. Blickstein, *id.*
372) Zuch v. Zuch, 503 N.Y.S.2d at 347.
373) *Id.*; Cf. factor one, comment in text.
374) DRL, *supra* note 26, at 286.
375) *Id.*
376) Muller v. Muller, 456 N.Y.S.2d at 921.
377) *Id.*

to "effectuate an equitable distribution of the property"[378]), both withstood challenges on complaints of vagueness and violation of due process[379]).

54. The major issue under this "catch-all" factor is the question whether marital fault is an appropriate factor in the equitable distribution. In the first draft of the new statute, marital fault was expressly excluded, as it is still in subdivision seven regarding child support[380]). However, when the final compromise in 1980 was reached, the exclusion was deleted from subdivions five and six[381]). Thus, the judicial pronouncements determine the role marital fault plays under "catch-all" factor thirteen, which also appears as factor eleven in subdivision six dealing with maintenance.

The Supreme Court of Suffolk County (1981) decided in *Giannola v. Giannola* that marital fault was to be considered with regard to equitable distribution[382]). The Supreme Court in *Kobylack v. Kobylack* (Westchester Cty 1981) states that, although fault may be considered (the court refers to *Giannola*) the facts and circumstances of the case obviate its consideration as a factor[383]). As a general rule fault should not be used as a punishment, but only as a consideration to tilt the balance where there are insufficient assets to make the parties economically "whole"[384]). This rationale has been criticized by the Supreme Court (New York Cty 1982) in *M.V.R. v. T.M.R.*[385]). There the court said that this decision implies that wealthy and propertied spouses may engage in marital misconduct with impunity, while the less fortunate will be financially punished[386]). This clearly was not intended by the legislature, noted the court, nor was the distinction based on wealth and poverty constitutionally permissible[387]). Whatever fault existed in the *Kobylack* case was balanced against plaintiff-wife's waiver of maintenance[388]). Fault was irrelevant because distribution of marital property could be made equitably without either party losing out economically[389]). The decision of the Supreme Court in *Kobylack* was condemned by both Appellate Divisions in the *Kobylack* case[390]). In 1983 the Appellate Division says that it cannot adopt the dictum in the decision of Special Term as to the circumstances where marital fault may be considered as an additional factor in the distribution of marital

378) No factors or standards are enumerated in the New Jersey statute.

379) The former New York DRL provision (see *supra* note 21) was considered in Vanderbilt v. Vanderbilt (1 N.Y.2d 342, 153 N.Y.S.2d 1, 135 N.E.2d 553, affd. 354 U.S. 416, 77 S.Ct. 1360, 1 L.Ed.2d 1456), where the court found that said term merely means that there are no "as matter of laws" requirements, one way or the other, as to those matters which are to be dealt with in the discretion of the court on all the facts; About the New Jersey statute, see Painter v. Painter, 65 N.Y. 196, at 205, 320 A.2d 484 (Sup. Ct. 1974).

380) Foster, *supra* note 20, at 49.

381) *Id.*

382) Giannola v. Giannola, 109 Misc. 2d 985, 441 N.Y.S.2d 341, at 343 (Sup. Ct. Suffolk Cty 1981); Moran v. Moran, 438 N.Y.S.2d at 422: misconduct of wife also precludes rights to alimony and requires to carrying for telephone, mortgage, utilities, taxes, insurance and necessary repairs; Trushkowsky v. Trushkowsky, 443 N.Y.S.2d at 17.

383) Kobylack v. Kobylack, 442 N.Y.S.2d at 395.

384) *Id.*

385) M.V.R. v. T.M.R., 115 Misc. 2d 674, 454 N.Y.S.2d 779, at 785 (Sup. Ct. New York Cty 1982).

386) *Id.*

387) *Id.*

388) *Id.* at 396; Cf. factor five.

389) *Id.* at 395.

390) Kobylack v. Kobylack, 465 N.Y.S.2d 581 (2d Dep't 1983); 489 N.Y.S.2d 257 (2d Dep't 1985); The Court of Appeals (477 N.Y.S.2d 109 [1985]) reversed and remitted to the Appellate Division, which rendered the 1985 decision. The Court of Appeals itself does not discuss anything relevant to this issue.

property[391]). And in 1985 it states that marital fault may only become a relevant consideration in the equitable distribution of marital property in rare and egregious situations and is not relevant here[392]).

This brings us to the decision of the Court of Appeals (1985) in *O'Brien v. O'Brien*[393]) which affirms the existing general opinion[394]). Indeed, one can hardly argue that the thesis of the Court of Appeals was unexpected. The Court quite simply affirms an already established rule[395]) and gives this view the "de jure" authority which it already had "de facto". The court states that, except in egregious cases which shock the conscience of the court, it (marital fault) is not a "just and proper" factor for consideration in the equitable distribution of marital property[396]). The rationale given for this view is that marital fault is inconsistent with the underlying assumption that a marriage is in part an economic partnership and upon its dissolution the parties are entitled to a fair share of the marital estate[397]). A second reason is that it will usually be difficult to assign marital fault[398]). At last, the court remarks that introduction of this fault-issue may involve the court in time-consuming procedural maneuvers relating to collateral issues[399]).

How did the judiciary reach this solution? The Supreme Court of New York County (1982) deals extensively with the issue in *M.V.R. v. T.M.R.* and provides three reasons to justify its decision that marital fault may not be considered as a factor in determining equitable distribution[400]). A first argument is found in the idea of marriage as a partnership[401]). Fault is not relevant since all that is being affected is the allocation to each party of their fair share, of

391) Kobylack v. Kobylack, 465 N.Y.S.2d at 582.

392) Kobylack v. Kobylack, 489 N.Y.S.2d at 260.

393) O'Brien v. O'Brien, 66 N.Y.S.2d 576, 498 N.Y.S.2d 743, 489 N.E.2d 712 (Ct. App. 1985).

394) The following cases rule that in principle marital fault cannot be considered in making an equitable distribution. The leading cases will be commented *infra* and are *not* quoted in this note. Alford v. Alford, 104 A.D.2d 390, 478 N.Y.S.2d 717, at 718 (2d Dep't 1984), app. denied 64 N.Y.2d 606, 487 N.Y.S.2d 1025, 476 N.E.2d 652; Bara v. Bara, 115 A.D.2d 628, 496 N.Y.S.2d 287, at 288 (2d Dep't 1985), app. dism'd 67 N.Y.2d 609, 495 N.E.2d 356, app. dism'd 68 N.Y.2d 664, 496 N.E.2d 241; Braunstein v. Braunstein, 114 A.D.2d 46, 497 N.Y.S.2d 58, at 62 (2d Dep't 1985); Hopper v. Hopper, 478 N.Y.S.2d at 148; Lentz v. Lentz, 103 A.D.2d 822, 478 N.Y.S.2d 56, at 58 (2d Dep't 1984); Mc Mahan v. Mc Mahan, 100 A.D.2d 826, 474 N.Y.S.2d 974 (1st Dep't 1984): involving a request for discovery of marital fault charges (decision says that in most instances, other than to exacerbate an already acrimonious relationship, no purpose would be served in allowing discovery of the various charges. However there may be exceptional circumstances making such disclosure appropriate); Stepakoff v. Stepakoff, 96 A.D.2d 1097, 467 N.Y.S.2d 64, at 66 (2d Dep't 1983): defendant is entitled to recover one-half of the value of the marital home. The fact that defendant had not shown that plaintiff had subjected her to cruel and inhuman treatment and had wrongfully ousted her is irrelevant; Stevens v. Stevens, 10 A.D.2d 987, 484 N.Y.S.2d 708, at 710 (3d Dep't 1985); Van Ess v. Van Ess, 100 A.D.2d 848, 474 N.Y.S.2d 90, at 92 (2d Dep't 1984); Weinstock v. Weinstock, 114 A.D.2d 450, 494 N.Y.S.2d 361 (2d Dep't 1985); After the decision of the Court of Appeals: Wilbur v. Wilbur, 116 A.D.2d 953, 498 N.Y.S.2d 525, at 527 (3d Dep't 1986); *Contra:* Kilmer v. Kilmer, 486 N.Y.S.2d at 484; King v. King, 486 N.Y.S.2d at 292; Lolli-Ghetti v. Lolli-Ghetti, 488 N.Y.S.2d 663; Moran v. Moran, 438 N.Y.S.2d at 422; Trushkowsky v. Trushkowsky, 443 N.Y.S.2d at 17; Gianolla v. Gianolla, 441 N.Y.S.2d at 343; Kobylack v. Kobylack, 442 N.Y.S.2d at 395.

395) The cases providing the reasoning and evolution of this established rule are commented *infra*.

396) O'Brien v. O'Brien, 498 N.Y.S.2d at 750.

397) *Id.*

398) *Id.*

399) *Id.*

400) M.V.R. v. T.M.R., 454 N.Y.S.2d at 780.

401) *Id.* at 782.

what has been accumulated during the marriage, which really belongs to him or her[402]). A second point is the difficulty in determining the marital fault[403]). This places the court in a difficult, if not impossible position which is entirely distinguishable from its role in granting or denying a decree of divorce[404]). In considering marital fault in equitable distribution, the court would be required, in God-like fashion[405]) to lay blame[406]). The court quotes *Chalmers v. Chalmers,* a decision of the New Jersey Supreme Court (1974): "Marriage is such an intricate relationship that it is difficult, if not impossible, to ascertain upon whom the real responsibility for the marital break-up rests . . . The concept of equitable distribution *requires* that fault be excluded as a consideration" (emphasis added)[407]). A last objection is the potential for discrimination and impermissible considerations[408]). In the case at bar the husband is homosexual. The court holds that judges frequently are not free from anti-homosexual preferences. Permitting consideration of marital fault opens the door to evidence of which the very purpose may be to prejudice judges[409]). This may lead to unlawful discrimination against members of already historically disadvantaged groups including women, poor and homosexuals as in the instant case[410]).

This radical point of view has been modified. A first decision explaining the now governing rule, was rendered by the Supreme Court of Suffolk County (1984) in *Wenzel v. Wenzel*[411]). The general rule remains the same as pointed out in the previous case; fault will normally not be considered as a factor in either granting or denying of equitable distribution[412]). However, unlike *M.V.R. v. T.M.R.,* the court accepts that this general rule has some exceptions. There are certain factors that can trigger fault as a factor[413]). There must be a two-step finding to decide that a certain factual situation presents an exception to the general principle[414]). The first step is the fact that there must be a fault, as in this case the assault on the wife's life. The second requirement is that this fault must produce such adverse physical and/or psychological effect on the innocent spouse as to interfere with her ability to be or become self-supporting. The court concludes that this is the case in the present situation[415]). The serious mental illness of the husband cannot excuse him from his acts of cruel and inhuman treatment[416]). To award the marital premises[417]) to the wife, the court develops the following reasoning. The husband could not have had the premises if his attempt to kill succeeded. Thus, the court also cannot

402) *Id.*
403) *Id.*
404) *Id.*: In the latter case the court must simply find certain acts specified by the legislature, such as that defendant abandoned the plaintiff for a period of a year, or that defendant committed an act of adultery. Dissolution follows directly from those factual findings.
405) *Id.* note 7.
406) *Id.* at 783.
407) Chalmers v. Chalmers, 65 N.J. 186, 320 A.2d 478, at 482 (Sup. Ct. 1974).
408) M.V.R. v. T.M.R., *id.* at 783.
409) *Id.*
410) *Id.*
411) Wenzel v. Wenzel, 472 N.Y.S.2d 830.
412) *Id.* at 833.
413) *Id.*
414) *Id.*
415) The husband, without provocation, attacked the wife with a knife and caused her serious injuries. As a result of this assault, he was convicted of attempted murder and sentenced to prison.
416) *Id.* at 834.
417) Cf. factor three.

give him a share of it now. Otherwise he would get indirectly what he failed to obtain by di attack upon the life of his wife[418]).

The case really establishing the rule which was affirmed in *O'Brien v. O'Brien* is *Blicks v. Blickstein* (Appellate Division 1984)[419]). The trial court, considering marital fault, awar all marital property to the wife. It noted that, but for fault (*in casu* abandonment), the husb would have received forty percent of the marital assets instead of nothing at all, as it ruled. appeal, the Appellate Division concluded that fault was improperly considered and direc that the sixty/forty split should be implemented. Since the affirming decision of the Cour Appeals in *O'Brien v. O'Brien* is not so detailed and refers several times to this decision of Appellate Division, one can argue that this decision is the most important as to this issue the state of New York.

Again, it is said that as a general rule, marital fault is not a relevant consideration in king an equitable distribution of marital property[420]). But there will be cases in which mar fault becomes relevant by virtue of its extraordinary nature[421]). These occasions will be v rare and will involve situatons in which marital misconduct is so egregious or uncivilized as desecrate the marital relationship, misconduct that shocks the conscience of the court, ther compelling it to invoke its equitable power to do justice between the parties[422]). The court c tinues that even in such an extreme case, fault is only one factor among thirteen to be consi red in determining the distribution of marital property[423]). The court also notes two other ceptions to its ruling. First the court suggests that the role of marital fault might be different fixing a maintenance award[424]). The Appellate Division (1986) in *Wilbur v. Wilbur* held tl consideration of fault in awarding maintenance is proper[425]). Secondly, this discussion abc marital fault must be distinguished from economic fault, which is a relevant consideration the purpose of equitable distribution[426]).

There are some cases examining whether a sexual relationship with other persons th the spouse, can meet the "shocking-the-court requirement" of the *Blickstein* exception. T Appellate Division (1985) in *Nolan v. Nolan* teaches that the adultery of the wife, given t mores of the time, is insufficiently egregious to justify her divesture of any portion of the pr perty interest she earned over the course of the marriage[427]). Her marital fault is simply not remarkable that it needs to be reflected upon in establishing her distributive award[428]). Also *Pacifico v. Pacifico* (Appellate Division 1984) the alleged illicit relationship that defenda maintained with his business partner was not relevant in the circumstances of this case for m

418) Wenzel v. Wenzel, *id.* at 836.
419) Blickstein v. Blickstein, 99 A.D.2d 287, 472 N.Y.S.2d 110 (2d Dep't 1984).
420) Blickstein v. Blickstein, 472 N.Y.S.2d at 113; the three reasons for this principle were pointed out *pra* in explaining the decision of the Court of Appeals (1985) in O'Brien v. O'Brien.
421) *Id.*
422) *Id.* at 113–114.
423) *Id.;* and at 114: litigants should be allowed to remove fault from the trial except insofar as it is nec sary to establish a cause of action for matrimonial action. (For a distinction between these two co cepts, cf. *supra* M.V.R. v. T.M.R.).
424) *Id.*
425) Wilbur v. Wilbur, 498 N.Y.S.2d at 527: the consideration in the maintenance decision of the insta case, however, was improper because the parties had stipulated that the court should not consid fault.
426) Blickstein v. Blickstein, *id.* at 114; Cf. factor eleven.
427) Nolan v. Nolan, 486 N.Y.S.2d at 418.
428) *Id.*

king a distribution of marital property[429]). And the mere fact of cohabitation in *Bizarro v. Bizarro* (Appellate Division 1984) should not serve to divest possession of the marital residence and should not be considered by trial court in making its distribution[430]). The dissent in *Mc Mahan v. Mc Mahan* (Appellate Division 1984) considers the facts of the case at bar, if established, to be shocking to the court, and thus to be the exceptional situation where marital fault becomes relevant and should be considered[431]). The wife's alleged flagrant conduct of extraordinary and lurid sexual and drug activities, including making sexual propositions for money to the husband's business associates, the couple's male friends and her attorney would be, if established, most egregious[432]).

The constructive abandonment of the husband in *Wilson v. Wilson* (Appellate Division 1984), based on his refusal of sexual relations, is not a relevant factor[433]).

55. Some decisions are based on a general consideration of essential fairness. In *Cappiello v. Cappiello* (Appellate Division 1985) the court distributes the marital property unequally, taking into account the other factors discussed[434]), but also the critical consideration of *essential fairness and equity,* incorporated as part of this "catch-all" factor[435]). The court remarks that equitable distribution is not designed either to result in a penalty or in a windfall: the fact of marriage standing alone, does not vest automatically property rights in the assets of the other spouse[436]). The court must determine those rights for each individual case, based upon the circumstances presented and the consideration of fairness and equity in terms of the several factors enumerated in N.Y.DOM. REL. LAW par. 236 Pt. B (5) (d)[437]).

In *Wilson v. Wilson* (Appellate Division 1984) the fact that plaintiff's economic situation and life style was disrupted by the short marriage is taken into account[438]). Whatever responsibility, it is plaintiff-wife who gave up a good job with a fine future and an appropriate dwelling place and had to replace both[439]). Albeit he is required to pay some money, there is no such change in the husband's way of life. The dissent disagrees with the majority's award to the wife, which he calls a bonanza because of the much less value of her one year services as a wife. However, the majority's response is that, while these factors may not lend themselves to precise mathematical formulation (nor do they intend a mere mathematical computation, which seems to be the tenor of the dissent), *essential fairness* requires that they be recognized. She is entitled at least to be restored to the extent possible to the economic situation which preexisted the marriage. It is indeed a weak marriage, which did not work out, but the dissent places undue weight on this fact and does not give adequate consideration to the disruption of her life. Moreover, states the court, even trying to follow such a mathematical formulation, the total amount we award as equitable distribution and spousal maintenance appears to be less than defendant's unreported income for one year.

429) Pacifico v. Pacifico, 475 N.Y.S.2d at 954–955.
430) Bizarro v. Bizarro, 484 N.Y.S.2d at 146 and 147; Cf. factor three.
431) Mc Mahan v. Mc Mahan, 474 N.Y.S.2d at 977.
432) *Id.*
433) Wilson v. Wilson, 476 N.Y.S.2d at 125.
434) Cf. factors two, six and eight.
435) Cappiello v. Cappiello, 488 N.Y.S.2d at 400.
436) *Id.* at 401.
437) *Id.*
438) Wilson v. Wilson, *id.* at 126.
439) *Id.*

In denying the wife her equitable share in the apartment the trial court specifically overlooked the critical consideration of *essential fairness and equity,* which is incorporated as part of the "catch-all" factor, says the Appellate Division (1986) in *Zuch v. Zuch*[440]).

56. In *Duffy v. Duffy* the Appellate Division (1983) does not accept the husband's contention, that the substantial liabilities he accrued on the marital residence should bar the wife from any share of the proceeds, because most of those debts predate the marriage[441]). One of the reasons however, to award the wife in *Cunningham v. Cunningham,* (Appellate Division 1984) ninety percent of the net proceeds of the sale of the marital residence, was her full responsibility for the maintenance of the house[442]).

57. The previous standard of living of the parties during the marriage also is an element which sometimes is considered. The Appellate Division (1986) in *Lischinsky v. Lischinsky* finds the distribution, recognizing the wife's financial need[443]) and the high standard of living the parties experienced while married, to be reasonable[444]). The wife in *Wilson v. Wilson* (Appellate Division 1984) gave up everything to live with defendant with all the benefits attendant upon his high status[445]). However, the fact that her standard of living plainly improved as a result of the marriage, is a factor of limited weight because of the shortness of the marriage[446]), her youth[447]) and ability to earn her living[448]). Also the use the wife has of a car has justified denying her exclusive possession of the Mercedes[449]).

58. The Appellate Division (1984) held in *Brundage v. Brundage* that Special Term could decline to award plaintiff-wife an equitable share of defendant's interest in a profit-sharing plan, if evidence revealed that he expended a substantial portion of the money withdrawn from this account for the support of plaintiff and his children and that he did not have any other income or assets to replace the money he withdrew[450]).

59. The court in *Ackley v. Ackley* (Appellate Division 1984) ruled that a gift from the wife's parents to both spouses was marital property[451]). In equitable distribution thereof the court gave most of the value to the wife because of the limited contributions of the husband[452]), but especially considering the "catch-all" factor, namely *in casu* that the transfer was motivated by the desire of the parents to benefit primarily the wife and the fact that the separation closely followed the transfer[453]).

440) Zuch v. Zuch, 503 N.Y.S.2d at 347: the fact that defendant has been extravagantly generous with plaintiff in bestowing upon her gifts of jewelry and furs cannot justify the denial of an equitable share for the plaintiff, because there is no evidence to support the previous conclusion, especially in light of the husband's high earnings ($ 260,000 per annum) at the time of the marriage.
441) Duffy v. Duffy, 462 N.Y.S.2d at 242; Cf. factor six, where the courts consider the origin of the property with which one contributes to the marriage.
442) Cunningham v. Cunningham, 482 N.Y.S.2d at 149.
443) Cf. factor one.
444) Lischinsky v. Lischinsky, 501 N.Y.S.2d at 941.
445) Wilson v. Wilson, 476 N.Y.S.2d at 123.
446) Cf. factor two.
447) *Id.*
448) Cf. factor one.
449) Fagelbaum v. Fagelbaum, 495 N.Y.S.2d 692, Matsuo v. Matsuo, 460 N.Y.S.2d at 628; Cf. factor one.
450) Brundage v. Brundage, 474 N.Y.S.2d at 548.
451) Ackley v. Ackley, 472 N.Y.S.2d at 806.
452) Cf. factor six: the husband's share was limited to the contributions he made.
453) Ackley v. Ackley, *id.*

60. Sixty-five percent of the marital property was awarded to the wife in *Cunningham v. Cunningham* (Appellate Division 1984) since she had to care for her mother while her former husband had no such responsibilities[454]).

61. Besides the income and property of the parties at the time of the marriage and at the time of the commencement of the action, as enacted in the first factor, the Appellate Division (1984) considers also the basically equivalent vocational skills and work experience of the parties in *Alwell v. Alwell*[455]).

62. In *Lee v. Lee* (Appellate Division 1983) the plaintiff suggests that circumstances of the first marriage between the parties may be considered under the "catch-all" factor[456]). The court remarks that the second marriage is unrelated to the first marriage, for purposes of equitable distribution. The second marriage invokes rights and duties of the parties, that must be determined as if there never had been an earlier marriage between them[457]). This decision shows that the application of factor thirteen requires some nexus to the current marriage. The „catch-all" provision cannot be used to revive rights or obligations deriving from a marriage which is not the subject of the action in which equitable distribution is sought[458]). There is no legal basis, concludes the court, for tacking the period of the first marriage to the second one in determining the current issues arising under the Equitable Distribution Law[459]).

4. Conclusion

63. The formula of equitable distribution seems attractive. The opponents of the equal distribution of the community property systems say it is too rigid and may be unfair to an income-producing spouse whose partner has not pulled his or her share of the load[460]). The adversaries of equitable distribution however say it is too flexible and unpredictable, and therefore not "equitable" but "discretionary" distribution[461]).

64. It is of course not a question of total rigidity or complete flexibility. Most states combine elements of both systems. There are community property states with equitable distribution[462]). And even where equal division is the rule, exceptions are provided for[463]). A con-

454) Cunningham v. Cunningham, 482 N.Y.S.2d at 150; her responsibility for her child of a previous marriage was found to be irrelevant because she had child support.

455) Alwell v. Alwell, 471 N.Y.S.2d 899; Cf. factors one, two and six.

456) Lee v. Lee, 93 N.Y.S.2d 221, 462 N.Y.S.2d 34, at 36 (2d Dep't 1983): the court stated that the current debate as to the scope of factor thirteen seems to be limited to the role of marital fault (decision in 1983, i.e. prior to Blickstein and O'Brien).

457) *Id.*

458) *Id.* at 37.

459) *Id.*

460) M.A. GLENDON, THE NEW FAMILY AND THE NEW PROPERTY 63 (1981); See also Bailey, *Principles of Property Distribution on Divorce-Compensation, Need or Community?*, 54 A.L.J. at 192 (1980).

461) GLENDON, *id.*, at 64.

462) The community property states with equitable distribution are Nevada, Puerto Rico, Texas and Washington (NEV.REV.STAT, 125–150; TEX.FAM.CODE 3.63 – the starting point in Texas is equal distribution, see 11 FLR 3025 –; WASH.REV.CODE ANN. 26.09.080); See also Foster & Freed, *supra* note 26, at 376 and 380.

463) IDAHO CODE 32–712 calls for a substantially equal division, unless there are compelling reasons to decide otherwise. Factors set out include consideration of the parties' retirement benefits. Remark the difference with California (cf. *infra* in this note) where the principle is equality and where under certain circumstances the rule can be modified and attenuated toward substantial equality in lieu of strict equality. In Idaho the main rule is substantial equality and a court can depart from it under certain circumstances (IDAHO CODE 32-712-714: "unless compelling reasons otherwise"). This means that the court in such a situation may equitably distribute the property. This is probably the reason why some authors do not classify Idaho under equal distribution states but rank it with the counter parts of equitable distribution (see MC CAHEY, *supra* note 11, Ch. 20, p. 95; Younger, *supra* note 10, at 242). Concerning the difference between 'equal', 'substantially equal' and 'equitable', see *supra* note 26; The ARIZ.REV.STAT. 25–318 calls for equitable distribution but the case law has construed this to mean 'substantially equal' distribution in the absence of sound reasons justifying a contrary result (see note 26). This makes the situation in Arizona very similar to the one in Idaho: in both states a 'substantially equal' distribution is the main principle but there is a margin for modifications toward equitable distribution under certain circumstances; As said *supra* there are some qualifications in California too where the court is allowed to depart from the strict equal division namely where "economic circumstances warrant . . . on such conditions as it deems proper to affect a substantially equal division" [CAL.CIV.CODE S. 4800 (b) (1)]; or where it determines any sum has been "deliberately misappropriated" by one party "to the exclusion of the community interest" of the other [ID. (b) (2)]; or if "the net value of the community . . . is less than $ 5,000 and one party can not be located through the exercise of reasonable diligence" [ID. (b) (3)]; A delicate question is whether marital fault is such a factor or circumstance under which one can depart from the main principle of equal or substantially equal division. It may not be considered in Arizona (Hatch v. Hatch, 547 P. 2d 1044 (Ariz. Sup. Ct. 1976); MC CAHEY, *supra* note 11, Ch. 20, p. 96) and California (Foster & Freed, *supra* note 26, at 383). The opposite is true in Idaho (Foster & Freed, *id.*).

siderable degree of elasticity is built into apparently inflexible regimes of community property[464]). There are also equitable distribution jurisdictions that mandate an equal distribution as starting point or even as rebuttable presumption[465]).

While equity truly is a necessary corrective of legal justice, laws may be defective because of their open-endedness[466]). The freedom for a judge to reallocate the spouses' property and to make a decision according to the unique circumstances of each individual case sounds ideal, in theory[467]). There remains, however, a need for certainty and predictability. It is a question of degree, of where to position the law concerning distribution of marital property upon divorce along the legal continuum which represents the tension between total discretion and total certainty[468]).

65. The UMDA prescribes the technique of equitable distribution[469]). According to this choice, most of the common law states in the United States adopted one or another form of equitable distribution. So did New York. It acknowledged the potential danger of discretion and unpredictability by enumerating statutory guidelines for the judge[470]). Some states even tried to curtail the judges' discretion by providing for a clear directive in the statute represented by the presumption of equal division[471]). This is not the case in New York.

464) K.J. GRAY, REALLOCATION OF PROPERTY ON DIVORCE 92 (1977).

465) Cf. *supra* note 26; See Sharp, *The partnership Ideal: The Development of equitable distribution in North-Carolina*, 65 N.C.L.REL. at 244–245 and 255 (1987).

466) GRAY, *supra* note 464.

467) M.A. GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 86 (1987).

468) GRAY, *supra* note 464, at 93.

469) The drafters of the UMDA believed firmly in the unfairness of equal distribution. They find contributions important but add that continuing needs of the parties are even more important. Need may provide a basis for a more equitable distribution in favour of a party who did not contribute actual income to the marital unit; See Fineman, *Implementing Equality: Ideology, Contradiction and Social Change*, 1983 WIS. L. REV. 789, at 871, see also at 838.

470) Brynteson, *supra* note 4, at 505–506: The 13 factors and the requirement to set forth in the opinion the factors considered and the reasons for the decision provide a check on the court's discretion (cf. *supra*).

471) Fineman, *supra* note 469, at 870; Cf. *supra* note 465.

66. However, more than a decade of experience has taught us that these systems, despite safeguards such as statutory factors, could not avoid the unpredictability that invariably accompanies flexibility. Therefore GRAY defends a trend toward certainty and away from discretion in the spectrum of legal solutions[472]).

The analysis of some New York cases in this article confirms this assertion. It is completely impossible for a couple in New York to predict what will be the result in court of the distribution of marital property[473]). The system is widely perceived as unfair by litigants because of its inconsistency in results in apparently similar cases[474]). This reliance on judicial discretion and the consequent lack of certainty means that the law is not serving one of its most important purposes in this area[475]): to furnish a basis for negotiation and future planning by the parties[476]). The system gives an advantage to the spouse who has time and money to wear down the other emotionally and economically[477]). Some studies even indicate that judges exercising their virtually uncontrolled discretion tend to protect the former husband's standard of living[478]).

67. The UMDA in general and the Equitable Distribution Law in New York seem to have gone too far on the continuum in the direction of flexibility. The socalled safeguards cannot convince. More certainty is required. One should come back a bit on the continuum towards certainty. There must be an equilibrium between certainty and flexibility. This equilibrium seems not to have been achieved in the New York system.

This is however not to say that the positive element of the New York Law, the fact that a distribution of marital property can be made with regard to specific circumstances, should be eliminated. One should keep this element of flexibility. We only need a more fundamental framework of principles that can bear this flexibility and guide the difficult balancing act of the judge.

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472) GRAY calls this "the lesson to emerge from the important experiment in matrimonial property legislation in New Zealand" (GRAY, *supra* note 464, at 93).

473) The equitable distribution system throws the spouses and their children into a lottery whose outcome depends on the luck of the judicial draw and the competence of counsel [Baxter, *Family Law Reform in Ontario,* 25 U. TORONTO L.J. at 261 (1975)].

474) Glendon, *Fixed rules and discretion in Contemporary Family Law and Succession Law,* 60 TUL. L. REV. at 1170 (1986); Glendon, *Family Law Reform in the 1980's,* 44 La. L. REV. at 1556 (1984).

475) Over ninety percent of divorce cases are settled by agreement *(Id.).*

476) Glendon, *supra* note 474; GLENDON, *supra* note 467, at 91–92; Rheinstein, *Division of marital property,* 12 WILL. L.J. at 433 (1976): Referral of a vital issue to judicial discretion can be the amount to reference to litigation.

477) "The equitable distribution laws give an opportunity and even encourage abuse of the litigation and negotiation processes more than do systems of fixed rules" (Glendon, *supra* note 474); GLENDON, *supra* note 467, at 92; Rheinstein, *supra* note 476.

478) GLENDON, *supra* note 467.